IN THE

# Supreme Court of the United States

OCTOBER TERM, 1948.

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No.

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SARAH O'DONNELL, ADMINISTRATRIX OF THE ESTATE OF WILLIAM O'DONNELL,

*Petitioner,*

*vs.*

ELGIN, JOLIET & EASTERN RAILWAY COMPANY,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

# UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

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## No. 9598

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SARAH O'DONNELL,
ADMINISTRATRIX OF THE ESTATE OF
WILLIAM O'DONNELL,
Plaintiff-Appellant,

VS.

ELGIN, JOLIET & EASTERN
RAILWAY COMPANY,
Defendant-Appellee.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

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1 Pleas had at a regular term of the District Court of the United States for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of September (it being the 1st day thereof) in the year of our Lord One Thousand Nine Hundred and Forty-Seven and of the Independence of the United States of America, the 172nd year.

Present:

Honorable John P. Barnes, District Judge
Honorable Philip L. Sullivan, District Judge
Honorable Michael L Igoe, District Judge,
Honorable William J. Campbell, District Judge
Honorable Walter J. La Buy, District Judge
Honorable Elwyn R. Shaw, District Judge
Honorable William H. Holly, District Judge

Roy H. Johnson, Clerk
Thomas P. O'Donovan, Marshall
Thursday, October 2, 1947
Court met pursuant to adjournment
Present: Honorable William J. Campbell, Trial Judge.

2 Pleas had at a regular term of the District Court of the United States for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of November (it being the 3rd day thereof) in the year of our Lord One Thousand Nine Hundred and Forty-Seven and of the Independence of the United States of America, the 172nd year.

Present:

Honorable John P. Barnes, District Judge
Honorable Philip L. Sullivan, District Judge
Honorable Michael L. Igoe, District Judge
Honorable William J. Campbell, District Judge
Honorable Walter J. La Buy, District Judge
Honorable Elwyn R. Shaw, District Judge
Honorable William H. Holly, District Judge

Roy H. Johnson, Clerk
Thomas P. O'Donovan, Marshall
Friday, December 12, 1947
Court met pursuant to adjournment
Present: Honorable William J. Campbell, Trial Judge.

3 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

Sarah O'Donnell, Administratrix of the Estate of William O'Donnell, Deceased,
Plaintiff
v.
Elgin, Joliet & Eastern Railway Company, a corporation,
Defendant.
No. 46 C 1493

Be It Remembered, that, on to-wit, the 29th day of August, 1946, the above-entitled action was commenced by the filing of the following Complaint in the office of the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, in words and figures following to-wit:

4 IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division
* * (Caption—No. 46 C 1493) * *
Plaintiff Demands Trial By Jury.

## COMPLAINT.

The plaintiff, Sarah O'Donnell, Administratrix of the Estate of William O'Donnell, Deceased, says:

1. On, to-wit, January 9, 1946, and long prior thereto the defendant Elgin, Joliet & Eastern Railway Company, a corporation, was the owner of and was operating as a common carrier by railroad various lines of steam railroad in and through Lake County, Indiana, and in and between the State of Indiana and the Northern Judicial District of Illinois.

2. Plaintiff further alleges that at the time of the commencement of this suit the defendant received, accepted and transported various shipments of freight in and through said district, both in intrastate and inter-

state commerce; that at the time of the commencement of this suit the defendant maintained offices in the said Northern Judicial District of Illinois for the transaction of its business, and at the time first aforesaid was and now is doing business in the said district within the true intent and meaning of Section 6 of the Act of Congress known as the Federal Employers' Liability Act (as amended).

3. Plaintiff further alleges that on the day first aforesaid, and at the time of the accident hereinafter complained of, William O'Donnell, her decedent, was employed by and was at work for the defendant in Lake County, Indiana, as a brakeman; that part or all of his duties were the furtherance of interstate and foreign commerce, and directly, closely and substantially affected such commerce; that at the time of the accident hereinafter complained of and prior thereto, decedent had been and was engaged in moving, distributing and classifying certain cars, and in making up, moving and breaking up various trains which were moving in interstate and foreign commerce and transportation; and by means of the premises, at said time and place, both decedent and defendant became and were subject to said Federal Employers' Liability Act and the Federal Safety Appliance Act.

4. At said time and place plaintiff's decedent, with divers other servants of the defendant, was engaged in switching certain cars in a yard belonging to the defendant in Lake County, Indiana, known as the Kirk yard, and was acting as field man in said switching crew. Said crew and divers other of defendant's employees had propelled certain cars onto a track in said yard known as No. 5 rip track and had filled said track so that certain of the cars intended to be placed thereon protruded out onto a certain lead track known as the west rip lead; and certain of the cars on said No. 5 rip track failed to couple automatically by impact.

5. It became and was the duty of plaintiff's decedent to open the knuckle on the said car which failed to couple as aforesaid, so that all of the cars standing on No. 5 rip track aforesaid could be coupled together and moved therefrom. Said decedent thereupon proceeded to the point where the cars were separated and attempted to

adjust the said coupling apparatus. While said de-
6 cedent was attempting to adjust said couplers, and was between the cars and in a position of danger, the crew of which he was a member, pursuant to the order and direction of the foreman or conductor, propelled a certain cut of 28 cars in a general southeasterly direction towards and approaching No. 5 rip track aforesaid; and the conductor in charge of said movement signaled the engineer to bring said cut of cars to a stop before reaching the cars projecting out on the west rip lead from No. 5 rip track.

6. At said time and place the defendant, by its servants, committed one or more of the following negligent acts:

(a) Carelessly and negligently propelled and impacted two or more of the said cut of cars upon and against the cars projecting out on the west rip lead at the place aforesaid.

(b) Carelessly and negligently failed to equip and maintain on the cars standing on No. 5 rip track, couplers which would couple automatically by impact without the necessity of men going between the ends of cars, contrary to the provisions of the Safety Appliance Act.

(c) Carelessly and negligently failed to equip and maintain on one of the cars being moved along the west rip track, couplers which would couple automatically by impact, contrary to the provisions of the Safety Appliance Act.

(d) Carelessly and negligently failed and neglected to warn decedent, who was in a place of obvious danger, should the cars on No. 5 rip track be moved, of the impending movement of cars along the west rip lead and against the cars standing on No. 5 rip track.

(e) Carelessly and negligently failed and neglected to exercise ordinary care to provide the defendent with
7 a reasonably safe place in which to work.

7. As a direct and proximate result of the act of negligence averred in paragraph 6 (c) aforesaid, when said moving cut of cars was brought to a stop the couplers between the second and third cars broke, and the two leading cars of said cut were violently impacted against the cars standing on No. 5 rip track and projecting out onto the west rip lead aforesaid; and as a direct

and proximate result of one or more of the acts of negligence alleged in paragraph 6 aforesaid, and in consequence thereof, the said cars were caused to run violently upon and over plaintiff's decedent, and he sustained injuries which resulted in and caused his death on, to-wit, January 9, 1946.

8. The decedent left him surviving Sarah O'Donnell, his widow, Elizabeth and Marlene, his daughters, and William and Richard, his sons, all of whom are living and by reason of the death of decedent have been deprived of their means of support and have sustained pecuniary loss and damage.

9. This suit is brought within three years of the death of decedent, and plaintiff brings herewith letters of administration granted to her by the Probate Court of Lake County, Indiana, as evidence of her right to sue.

Plaintiff, Sarah O'Donnell, Administratrix of the Estate of William O'Donnell, Deceased, asks judgment for Eighty-Five Thousand Dollars ($85,000.00).

Joseph D. Ryan
Attorney for Plaintiff.

Joseph D. Ryan
100 N. La Salle St.
Chicago, Illinois
Franklin 5124.

8 And afterwards on, to wit, the 19th day of September, 1946 came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Motion To Dismiss in words and figures following, to wit:

9 IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

• • (Caption—No. 46 C 1493) • •

MOTION TO DISMISS.

Now comes the defendant Elgin, Joliet and Eastern Railway Company, a corporation, by Knapp, Cushing, Hershberger and Stevenson and Harlan L. Hackbert its attorneys and moves to dismiss plaintiff's action for the following reasons:

1. It affirmatively appears from the allegations of paragraph 9 of plaintiff's complaint that plaintiff is an administratrix appointed by the Probate Court of Lake County, Indiana and as such lacks capacity to maintain an action in this court under section 419 of the Illinois Probate Act (Ill. Rev. Stat., ch. 3, sec. 419) which is made applicable to this action by Rule 17 (b) of the Rules of Civil Procedure.

2. It affirmatively appears from the allegations of plaintiff's complaint that the death of plaintiff's decedent occurred in Lake County, Indiana. Under section 6 of the Federal Employers' Liability Act (45 U.S.C.A. sec. 56), the jurisdiction of this court is concurrent with the jurisdiction of the courts of Illinois, and under section 2 of the Illinois Injuries Act (Ill. Rev. Stat., ch. 70, sec.
10 2) the courts of Illinois have no jurisdiction of this action.

.....

.....

Attorneys for defendant
208 S. LaSalle Street
Chicago 4, Illinois
State 0300

Service of a copy of the foregoing motion is acknowledged this 19th day of September, 1946.

Joseph D. Ryan
Attorney for plaintiff

11 And afterwards, to wit, on the 1st day of November, 1946, being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William J. Campbell, District Judge, appears the following entry, to wit:

12 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 46 C 1493) * *

This cause having been heretofore taken under advisement by the Court on the motion of the defendant to dismiss the complaint herein after due consideration and the Court being now fully advised in the premises

It Is Ordered that said motion to dismiss be and it is hereby overruled and denied

13 And afterwards on, to wit, the 13th day of November, 1946 came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Answer in words and figures following, to wit:

14 IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 46 C 1493) * *

ANSWER.

Now comes the defendant Elgin, Joliet and Eastern Railway Company, a corporation, by Knapp, Cushing, Hershberger and Stevenson and Harlan L. Hackbert, its attorneys, and for answer to plaintiff's complaint says:

First Defense

The complaint fails to state a claim against the defendant upon which relief can be granted.

Second Defense

1. Defendant admits:

a. The allegations of paragraphs 1 and 2 of plaintiff's complaint.

b. The allegations of paragraph 3 of plaintiff's complaint that on January 9, 1946, and at the time of the accident complained of, William O'Donnell, plaintiff's decedent, was employed by and at work for the defendant in Lake County, Indiana, as a brakeman.

c. The allegations of paragraph 4 of plaintiff's complaint that at the time and place referred to, plaintiff's

decedent and other servants of the defendant, were engaged in switching certain cars in defendant's Kirk Yard in Lake County, Indiana, and he was acting as field man in said switching crew; and

d. The allegation of paragraph 9 of plaintiff's complaint that this suit is brought within three years of the death of decedent.

2. Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 8 and the remaining allegations of paragraph 9 of plaintiff's complaint.

3. Defendant denies each and every other allegation of plaintiff's complaint.

Third Defense

Defendant alleges that the death of plaintiff's decedent was caused solely and proximately by the negligence of the plaintiff.

Fourth Defense

Defendant alleges that the death of plaintiff's decedent did not result in whole or in part from the negligence of any of the officers, agents or employees of the defendant and no violation by the defendant of any statute enacted for the safety of its employees contributed to the death of plaintiff's decedent, but his death resulted solely from an ordinary and usual danger and risk incident to the performance of duties of his employment which were assumed by him.

Fifth Defense

In the alternative, defendant denies that any violation of the Federal Safety Appliance Act contributed in whole or in part to the death of plaintiff's decedent and alleges that if the death of plaintiff's decedent was caused in whole or in part by the negligence of the defendant as alleged in subparagraphs (a), (d), or (e) of paragraph 6 of Plaintiff's complaint, plaintiff's decedent was guilty of contributory negligence by reason whereof the damages recoverable by plaintiff shall be diminished in proportion to the amount of negligence attributable to him.

Sixth Defense

In the alternative, defendant alleges that if plaintiff was granted letters of administration by the Probate Court

of Lake County, Indiana, plaintiff lacks capacity to maintain an action in this court under Rule 17 (b) of the Rules of Civil Procedure, and section 419 of the Illinois Probate Act.

Seventh Defense.

In the alternative, defendant denies that this court has jurisdiction of an action for wrongful death occurring outside the State of Illinois under section 6 of the Federal Employees' Liability Act.

Knapp, Cushing, Hershberger & Stevenson
Harlan L. Hackbert
Attorneys for defendant
208 S. La Salle Street
Chicago 4, Illinois
State 0300.

Service of a copy of the foregoing answer is acknowledged this 13 day of November, 1946.
Joseph D. Ryan
Attorney for plaintiff.

17 And afterwards on, to wit, the 20th day of November, 1946, came the Plaintiff by her attorneys and filed in the Clerk's office of said Court her certain Motion to Strike in words and figures following, to wit:

18 In the United States District Court
For the Northern District of Illinois
Eastern Division

• • (Caption—No. 46 C 1493) • •

MOTION TO STRIKE.

Comes now, Sarah O'Donnell, Administratrix of the Estate of William O'Donnell, deceased, by Joseph D. Ryan, her attorney, and moves that the defendant's Fourth Defense be stricken because it does not constitute a defense in law to the complaint herein.

Said plaintiff also moves to strike the defendant's Sixth and Seventh Defenses, because this court has already adjudged them insufficient in law.

Joseph D. Ryan
Attorney for Plaintiff.

Joseph D. Ryan
100 N. La Salle Street
Chicago, Illinois
Franklin 5124.

19 And afterwards, to wit, on the 18th day of February, 1947, being one of the days of the regular February term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William J. Campbell District Judge, appears the following entry, to wit:

20 In the District Court of the United States
For the Northern District of Illinois
Eastern Division

• • (Caption—No. 46 C 1493) • •

This cause having been heretofore taken under advisement on the motion of the plaintiff to strike the fourth, sixth and seventh defenses in the defendant's answer, after due deliberation and the Court being now fully advised in the premises said motion to strike is sustained and

It Is Ordered that said defenses, fourth, sixth and seventh, be and they are hereby stricken.

21 And afterwards, to wit, on the 30th day of September, 1947, being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William J. Campbell District Judge, appears the following entry, to wit:

22 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 46 C 1493) * *

This being the day to which this cause was continued for further trial again come the parties to this suit by their attorneys, respectively, and the Jury heretofore empaneled and sworn herein also come and the trial of this cause proceeds and at the conclusion of all the evidence it is

Ordered that leave be and it is hereby given to the plaintiff to file instanter an amendment to her complaint, whereupon the defendant enters its motion for a directed verdict which motion is denied; the plaintiff enters its motion to withdraw sub-paragraphs (d) and (e) of paragraph 6 of the complaint which motion is granted and said sub-paragraphs (d) and (e) are accordingly withdrawn; the defendant enters its motion to strike sub-paragraphs (a), (b) and amended sub-paragraph (c) of paragraph 6 of the complaint and the Court having heard the arguments of counsel thereon and being fully advised in the premises, said motion is also denied and the hour of adjournment having arrived it is

Further Ordered that the Jury be and they are hereby permitted to separate until October 1, 1947, at 10:00 o'clock A. M.

23 And on the same day, to wit, the 30th day of September, 1947 came the Plaintiff by her attorneys and filed in the Clerk's office of said Court her certain Amendment To Complaint in words and figures following, to wit:

24 IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 46 C 1493) * *

AMENDMENT TO COMPLAINT.

Comes now Sarah O'Donnell, Administratrix of the estate of William O'Donnell, Deceased, and asks leave to amend her complaint herein by substituting in lieu of sub-paragraph (c) of paragraph 6 of said complaint, the following:

(c) Carelessly and negligently failed to equip and maintain on one of the cars being moved along the said track, a safe and efficient coupler which would remain coupled to the car to which it was attached, but which, on the contrary, was so defective and insecure that it broke loose from said car, contrary to the provisions of the Federal Safety Appliance Act.

Joseph D. Ryan
Attorney for Plaintiff.

Joseph D. Ryan
100 N. La Salle St., 2007
Chicago 2, Ill.
Fra. 5124.

25 And on the same day, to wit, the 30th day of September, 1947 came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Amendment To Answer in words and figures following, to wit:

26 IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 46 C 1493) * *

AMENDMENT TO ANSWER.

Now comes the defendant Elgin, Joliet & Eastern Railway Company, a corporation, by Knapp, Cushing, Hershberger and Stevenson and Harlan L. Hackbert, its attor-

neys, and asks leave to amend its answer heretofore filed herein by adding as an eight defense the following:

Eighth Defense.

Defendant denies that the Federal Safety Appliance Act applies to the movement referred to in subparagraph c of Paragraph 6 of plaintiff's complaint as amended and specifically denies that the coupler referred to in said paragraph failed to comply with the provisions of the Federal Safety Appliance Act.

Knapp, Cushing, Hershberger & Stevenson
Harlan L. Hackbert
Attorneys for Defendant.

27 And afterwards on, to wit, the 4th day of December, 1947 there was filed in the Clerk's office of said Court a certain Transcript of Proceedings in words and figures following, to wit:

28 United States of America
Northern District of Illinois
Eastern Division

IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 46 C 1493) * *

TRANSCRIPT OF PROCEEDINGS

Before
Hon. William J. Campbell
Judge
Paul A. Ruhe
Official Reporter
United States District Court
Northern District of Illinois
United States Court House
Chicago 4, Illinois
WABash 4383

30 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

• • (Caption—No. 46 C 1493) • •

Transcript of proceedings had in the above-entitled cause before the Hon. William J. Campbell, one of the judges of said Court, and a duly impaneled jury, in his courtroom, United States Court House, Chicago, Illinois, commencing Monday, September 29, 1947, 2 o'clock P. M.

Present.

Mr. Joseph D. Ryan,
appeared on behalf of Plaintiff;

Mr. Harlan L. Hackbert,
appeared on behalf of defendant.

31 The Court: You may proceed with your opening statement.

Mr. Ryan: Your Honor, we have an engineer's drawing or plat of that portion of the yard which we regard as material to the issues and which will enable the jury to understand the movement involved, and I assume that there will be no objection to my using it when I make my opening statement. I can have the engineer—

The Court: Apparently there is no objection. So you may do so.

Mr. Ryan: All right.

The Court: The defendant may use it also, if he cares to.

Mr. Hackbert: Thank you.

Mr. Ryan: Is that where you want it, your Honor?

The Court: Wherever it is most convenient for you and the jury. I think that is a good location. I can look at it later. Let the jury look at it now.

It is too bad it is not a little larger. While you were blowing it up, it should have been a little larger.

Can the jurors make it out?

Mr. Ryan: I will explain it to them.

The Court: Very well. Go ahead with your statement.

Mr. Ryan: May it please the Court, ladies and
32 gentlemen of the jury:

It is the privilege of the defendants at this time to make what is known as an opening statement, and outline the facts which they expect to prove in the case. Our statement, of course, is not evidence, and the purpose of making an opening statement is to advise the jury what each side expects to prove and explain the location of the accident, and how it happened, as briefly as possible.

The decedent, William O'Donnell, came to his death on January 9, 1946, at the Kirk Yard in Gary, Indiana. He had been employed by the E. J. & E. Railroad for twenty years, or more, as a switchman or brakeman and conductor in the yard in question. He was forty-five years old at the time of his death. He was forty-five, November, 1945, which was two months after that, or a month and a half after he became forty-five he came to his death.

On the particular night of his accident, which occurred about somewhere between eight o'clock and nine o'clock; on January 6th, he and his switching crew had reported for work at four o'clock in the afternoon, as was their custom on that shift. They reported at four o'clock and worked until twelve o'clock, customarily.

33 The switching crew consists of an engineer, locomotive engineer, a fireman and three switchmen. The three switchmen are the conductor, (the head man that follows the engine—and what they call a field man). In other words, these three men are under the direction of the foreman and conductor, switch cars in and out of various tracks and to their destination.

The preliminary work they did for several hours before this accident is unimportant. But the last movement, I think, that was being made, and which we claim was the movement which caused the death of the decedent, William O'Donnell, was taking place by taking cars from the various tracks. There had been cars taken from these various tracks and placed down in various parts of the yard. These are what are called repair tracks or rip tracks, and plaintiff came to his death on track 5. That is the second to the last track, that my pencil is on here.

You have track 1—from the top of the map. You are looking north, so that to your right hand side is east,

and your left hand side is west, and commencing at the top of the map we have tracks 1, 2, 3, 4 and 5.

I want to pull this out enough so that the jury can see the end of it. You will observe that this track here, number 27, that runs straight east and west are virtually straight east—the points of the compass show the actual directions, but this yard is known as an east and west yard at this point.

The last movement that was made, the engine was headed in a westerly direction and had backed into either track 1 or track 2. Track 2, I believe, and tied onto 26 cars. The movements would appear to be a little complicated unless it is explained to you.

The engine was facing west during the hours they were working there. They went into the advance tracks, and then distributed the cars where they wanted them.

I did not explain all these movements because it is immaterial what they did until the time involved. However, they had placed a number of cars on track 5 previously, and it was their purpose to make up the cars on that track.

Ladies and gentlemen, so you will understand, they had placed cars down here on track 5. In making up a train of cars on track 5, they had taken them from various tracks and distributed them. They went in on track 2 with the engine headed west. The engine backs in this way, and there were tied onto it 26 cars. They had already made up partially, made up the cars on track 5.

The natural brother of the decedent was the foreman of this switching crew, and another man—I can't recall his name just now—was the head man of the crew, and William O'Donnell was the field man, and they worked interchangeably on this work.

They had been in on track 5 and had distributed a number of cars, perhaps 38 or 39 cars in there, and had stretched that track so that part of the cars went out on the east lead on the east end of the yard, and some of the cars came up here on track 5 and extended out, one or two, out onto the rip track known as the rip track E.

After the stretching movement was made, this last movement I told you about, occurred, that was done under the direction of Jack O'Donnell, his brother.

The signals were given to the engineer. He backed in here, tied on the 26 cars, and pulled all the way down to the switch beyond 27. So then he pushed the cars back and took these various leads, with a view to putting two of the end cars on track 5.

36 We have photographs of the yard and of these tracks, which were taken recently, in the presence of railroad officials, and with the understanding that that was our privilege, under the rulings of this Court, which will show these various tracks, although they are occupied by a number of cars.

In any event, the last movement was being made, and they intended to put one car, either one or two cars—I think it was one car, the end car—down on track 5 and push up that track.

They had thrown in four or five cars after the stretching movement had occurred, and there were a couple of gaps between the cars on track 5 that extended out onto the lead, and the one car of the 26, the most easterly car, was to go in the end of track 5.

The way that was done, of course, the conductor would signal the movement, it would be transmitted to the engineer away in the distance to the west, 26 cars of 40 or 45 feet per car, which is quite a distance. So, the signals were given to the engineer by means of lantern signals at night, and the last movement was to place this end car, the most easterly car of the 26, on the west end of the cars on track 5, fill up the couple of gaps, and

37 couple the cars together, so that the train from the east—the engine had to come around to the east and then to pull up that track out to the classifying tracks and the classifying yard.

The railroad has a stipulation, which we will have here shortly, which shows that a number of these cars and all of this work was in interstate commerce work. I shall not waste any time explaining that to you until I have the stipulation to read to you, and that counsel has agreed to produce.

In any event, the work that the decedent was engaged in, and his car, was clearly in interstate commerce.

Here is what happened. Just before the cars were pulled out of number 2, the 26 cars, Jack O'Donnell, that is our witness, the man who knows all about this accident, and the only one who knows about it, virtually all about it, saw his brother William after number 5 track had been stretched and after they were getting ready to pull out 26, William O'Donnell walked over to Jack, the brother who was acting as foreman, to find out what the next movement would be.

Of course, the conductor was the only one who had the list of movements and had it marked down on the
38 paper and knew just where these cars were going during the night.

At that time he told William that they had one car to go in on track 5, and William stated to Jack—he was the field man—that there were a couple of knuckles on track 5—that is railroad language—which had to be opened. In other words, on the last movement or two, that when the cars were propelled toward this track and by the momentum permitted to run in, they would be permitted to couple automatically, but there were a couple of openings. So William told Jack, pointed out to him that there were two places where the cars had not been coupled, and that he had to go over to that track to make those couplings.

When this movement was made, there was a—when Jack O'Donnell gave the signal to the engineer after he pulled down—mark you, he had to pull down to the west far enough so that the end car of the 26 cars had to come down here beyond this switch. That is the only way he could get back in here, which was a great distance.

In the meantime, Jack had to get out here on the side in order to give his signals. There was a lot of smoke at the time and his signal was not observed, per-
39 haps, as readily as it should be. That is merely incidental to what happened. But finally the signal was given and the engineer did start to back up this train, and, as he was backing up, Jack gave two or three signals for the engineer to slow down, which he failed to get, on account of the smoke in the Yard.

So that when he finally did get his signal, he gave him what is known in railroad language as a washout signal. That is a quick signal across the track in that fashion.

The engineer saw that signal and stopped, and applied his brakes suddenly, and stopped suddenly. And when he did, a coupler on the second car from the end broke and two cars of their own momentum crashed into the standing cars on the end of track 5, and when they did, at that particular moment, it is our contention that William O'Donnell was at that time between the cars opening oue of these knuckles, that it failed, and did not function. In any event, he was between the cars there when the coupler broke; without notice or warning to him the cars were impacted between two cars with great violence and he was run over and killed.

I want to say this to you, so that you will understand the situation. Nobody saw what happened here at all.
40 The last time that William O'Donnell, who was known as Bill, the last time Bill O'Donnell was seen was just before this last movement was made.

After the movement was made, the engine went around what they call the horn, and went down to the other end of the yard. I think they did some more switching. It was not unusual to have the field man out of sight for a long time.

Jack missed him, but thought he had gone down to the other end. He thought he had walked down instead of riding with the engine. They proceeded with their work and went down to the other end of the yard, and finally this train, after it was coupled up, was pulled on its way from the east end on to the east lead.

After this movement that was made by the cars that broke loose, the cars were coupled up and Jack O'Donnell went down along track 5. He will tell you. He went down there with his lantern to see that all of these cars, where there had previously been a gap or two—they were all coupled together when he went down there.

It is our contention, of course, that at that time
41 Bill O'Donnell had already been run over and killed.

Later on, after they had pulled this train out of there and after Bill didn't show up at the east end to go over to the classifying yard, they discovered that he had been run over just a short distance—Jack O'Donnell will tell you just where he was, and he made measurements of it. He found his brother's arm had been completely cut off. He had been virtually cut to pieces

and he had been pushed along on the ground. It showed where his body had been pushed for some forty or forty-five feet.

So, it is our contention that the conclusion is inevitable that the time he was run over and killed, as shown by the physical facts and circumstances, was when the coupler broke loose while he was engaged in the course of his duties between the cars, and that the defective coupler was the proximate contributing cause of this accident.

I want to say one thing, very briefly, to you. Under the Federal Employers' Liability Act, the law imposes an obligation on the railroad to exercise due care for the safety of its employees, and makes them liable for any negligence on the part of any of its officers,
42 agents or employees or for any defect or insufficiency in the machinery, appliances, roadway, track, walls, or other equipment. And if their negligence, in whole or in part, proximately causes or contributes to cause an accident, the railroad is liable under the provisions of the Federal Employers' Liability Act, and in the event of negligence or contributory negligence on the part of an employee who was injured by reason of any negligence on the part of the railroad, such contributory negligence does not bar the employee's right to recover, or his widow or administratrix in the event of a death, but should only go in mitigation of damages.

There is another statute which we rely upon in our lawsuit and in our complaint, and which we have pleaded, known as the Federal Safety Appliance Act, which provides that the railroad must have its cars and its equipment, under all the circumstances and conditions, equipped with safe appliances, and if an employee in such circumstances, while engaged in interstate commerce is injured or comes to his death by reason of a defective safety appliance, then the railroad is absolutely liable and no negligence on the part of the employee contributing to his injury makes the slightest difference.
43 In other words, one of the questions you will have to determine in this case is whether the breaking of the coupler and the impacting of these cars, as evidenced by the physical facts, the undisputed physical facts and circumstances, showing that is where he lost his life, were due to that cause and could not be due to anything else.

I make my statement at this time so that counsel may understand that we are claiming that the proximate cause of this accident was the breaking of that coupler, and the decedent, Bill O'Donnell, was between the cars adjusting the knuckles.

We will show you the coupler did not couple, and the presumption arises that, of course, they did not, which they frequently do not. But, in any event, going between cars, even though negligence, is no defense to this accident.

Mr. O'Donnell left him surviving his widow. I think she was forty-three or forty-four years of age. He also left surviving four children. The oldest daughter at that time, I believe, was twenty, and she is now working. We did not bring her.

Another child, the oldest boy, at the time of the
44 accident, was fifteen. And then she had two other children, eight or nine, and seven.

I will call her to the stand briefly to give the exact ages of the children and to tell as to the habits and the earning capacity of the husband.

Bill O'Donnell was a careful, prudent man, worked steadily, and for five or ten years we have his exact earnings.

I believe this lady, prior to her marriage, was a teacher, and she kept a complete record all these years of his exact earnings, and she will be able to tell you just what he earned for at least four or five years prior to this accident. Of course, it can be verified by the railroad records, if there is any question about it. Her records will show that he earned approximately thirty-five or thirty-six hundred dollars a year. He brought all his money home and spent it all on his wife and family. I submit that the conclusion is inevitable that her loss, her financial loss, runs into many, many thousands of dollars.

I thank you.

45 Mr. Hackbert: If the Court please, ladies and gentlemen of the jury:

Perhaps I can give you just a few more details about the drawing, about the layout in the yards, that will make some of the testimony in this case a little bit more intelligible.

This portion of the yards which is shown in this blueprint is, of course, only a part of it. The lead Track 27 runs far on up to the northwest and similarly these tracks do not stop here, as the blueprint does. These tracks run on in a generally easterly direction for a considerable distance, where they join, and then a single track goes around the roundhouse and leads back down into Kirk Yard, the big classification yard which lies down in here.

These tracks at the bottom of the blueprint lead down into another yard which is called the Terminal Yard. That is down where those tracks lead into the roundhouse and into some of the other buildings or parts of the yards down there that are used for the maintenance and servicing of the railroad's equipment. These tracks in this particular yard up here, in the car repair yard, or the rip tracks as they are sometimes called, are the yards in
46 which cars are set out that have to be repaired, where there has been something gone wrong and they require repairs during the course of the particular journey that they are making. These cars are set in here, spaced separate and apart on all of these tracks. The cars are uncoupled one from the other so that the car repairman can pass from one side of the car to the other very freely.

The crew, of which the two O'Donnells were members at that time, did the switching in the car repair yard. The car repairmen worked there during the day. There is no repair work at night. The switching is done at night. This particular crew had the particular duty to come in there —that is, they would set the cars that would have to be repaired, and they would take out the cars on which the repairs had been completed, and move those cars out of the car repair yard and get them placed in such a position as to go about the business for which they were intended.

As Mr. Ryan said, the crew came to work at 4 o'clock in the afternoon, and their scheduled time was to operate until midnight. As a matter of actual fact, what that crew did was to work until the work had been done. That might mean they would be through at 9 o'clock, 10 o'clock,
47 and they might have to work until midnight in order to get the work done; but, in any event, when they had finished switching the cars in and out of the car repair yard, their work was finished.

During the course of their work this particular night they had been placing a lot of cars in here on Track No. 5

which runs for some considerable distance to the east. Those are cars on which repairs had been completed and which were to be taken out and taken back down to Kirk Yard where they would be made up into trains and resume the journey, wherever it might be. They had reached the point where they were working on the last cut of cars. They had pulled a cut of cars off Track No. 2.

I think the evidence will show there were 28 cars rather than 26 cars. It is not a matter of much concern, and they had pulled these cars back off Track No. 2 and up here, I think, beyond this point here where the switch is, and you come down on the lead track leading to the various tracks in the car repair yard.

The duties of William O'Donnell, the man who was killed, in the movements was to go out ahead of the
48 other members of the crew and see the knuckles on the cars which were standing, on the various cars—the knuckle is part of the coupler—the couplers of those cars will not come together and unite unless the knuckle of at least one of those cars is open, so that when the impact occurs they will move together and lock.

It was his job to go out ahead of the crew, knowing what track they would switch in on next, and see the knuckles were all so lined up that when they came pushing in on the track the cars would knuckle up together.

He had gone down at about the same time they were pulling the 26 or 27 cars out of Track 2, to see that the couplings were all lined up so that when they came in on Track 5 the cars would all couple together at the first attempt.

He was not seen again alive after he started down to Track 5.

As Mr. Ryan says, the movement of 26 or 28 cars backed along the lead track, the last two cars or the most easterly two cars did break off and came down onto Track No. 5. The crew then went down about the business of switching out the rest of the 24 or 26 cars, and coupl-
49 ing. Some of the cars were put in the tracks of the Terminal Yard. Others were set on Tracks 1 or 2. Then one of the cars in that remaining string of twenty odd cars was also put back in on Track No. 5, after the two cars that had gone in there, and then when they completed all those movements and had set all the 24 or

26 cars at various places where they were supposed to go, then the crew came down on one of these two tracks down here, ran around down to the east end around the roundhouse, and came in and tied on the cars standing on Track 5 at the other end, and coupled all the cars except the one single last car that was not coupled onto the others—they hauled all the rest of them out on Track 5 around to the east around the roundhouse and back into Kirk Yard, and when they did that they had finished their night's work.

After that, Jack O'Donnell, the foreman of the crew, went down to the switchman's area to look for his brother, and his brother wasn't there. He went back up into the repair yard—the evidence will show where—and looked for his brother and he wasn't there. He went to the switchman's shanty and the roundhouse and he
50 and the engineer started looking for his brother, and finally, about an hour after this movement had been made, he came down Track No. 5 and then for the first time they found the body of William O'Donnell.

As Mr. Ryan tells you, it is their theory of the case that the man was run over and killed at the time the two cars came in when the coupling broke and moved in on Track 5, and he believes the physical facts will support that contention.

Our contention, on the other hand, is that the man was killed during one of the other two movements on Track No. 5—either the movement when the single car went in there, or the movement a little while later when they pulled all the cars standing on Track 5 out of there, and the question for you to decide on the question of liability is which of the movements this accident occurred on.

There is no contention made by Mr. Ryan in this case that if this fatal injury occurred at the time of that final movement out of Track 5, that there is any liability on the part of the railroad. The evidence as it develops will show various reasons why.

A railroad yard is, of course, a dangerous place in which to work. There are some hazards to working
51 in a railroad yard which are inescapably present. No amount of care on the part of the railroad company will avoid some accidents that happen in a railroad yard and under the Federal Employer's Liability Act the rail-

road is only liable if it is at fault. It is perfectly true if you find from the evidence that the accident occurred at the time this coupler broke and further that the fact that the coupler broke caused these cars to move down in there, that is a fact for you to consider in determining whether or not the railroad company was at fault.

But there is no charge here of any fault on the part of the railroad company in connection with that last movement out of Track 5.

We think the evidence will show that was the time when the accident occurred, and we ask you to keep an open mind until all the evidence is in, until you hear all of the testimony of the witnesses who were there that night, until you hear all of the testimony of the physical facts and circumstances which, on the one hand, Mr. Ryan thinks corroborate his version, and, on the other hand, which we think corroborate our version and if, as I
52 say, you find—or, let me put it this way:

The burden is on the plaintiff to prove her case. The burden is not on the railroad company to prove it was not at fault. If you believe the matter is evenly balanced and you cannot make up your mind which of the two movements concerned was the one in which he lost his life, then you are in duty bound to return a verdict of, "not guilty, the plaintiff has not proved her case."

Or, if you think the greater weight of evidence shows the fatal injury occurred in the last movement, then again it is your duty to return a verdict in favor of the railroad company.

That, ladies and gentlemen, is the issue in the case, and I ask you to keep an open mind until you have heard all the evidence and until you have heard the Court's instructions and the final arguments, before you come to any conclusion as to what it was that actually happened out there that night.

Thank you.

53 The Plaintiff, to maintain the issues on her behalf, introduced the following evidence:

The Court: The plaintiff may proceed.

Mr. Ryan: May it please the Court, I desire to read into the record the stipulation agreed upon between counsel for the respective parties.

The Court: You may do so.

Mr. Ryan: (Reading):

"In the United States District Court
For the Northern District of Illinois
Eastern Division

* * * (Caption—No. 46 C 1493) * * *

STIPULATION.

"It is stipulated and agreed by and between the parties hereto, by their respective attorneys, that with reference to the allegations of paragraph 3 of plaintiff's com-
54 plaint that part or all of the duties of plaintiff's decedent were the furtherance of interstate and foreign commerce, and directly, closely and substantially affected such commerce. The material facts are:

"The duties of crew of which William O'Donnell, the decedent, was a member were to switch out the cars on the tracks in the car repair yard of the defendant at Gary, Indiana, commonly known as the 'rip tracks.' The cars upon which repairs had not been completed would be set back on the repair tracks. The cars upon which repairs had been completed were either placed in the terminal yard at Gary for local and yard movements, or were made into a train and hauled to defendant's general classification yard at Gary known as Kirk yard. The latter group of cars consisted indiscriminately of loaded cars and empty cars. Some of the loaded cars contained shipments which had been consigned between points within the State of Indiana and points outside the state and some contained shipments moving wholly within the State of Indiana. Some of the empty cars which were owned by other railroads were intended to be delivered by the defendant to connecting carriers at points inside or out-
55 side of Indiana; other empty cars were subsequently loaded with shipments some of which moved to points within, and some to points outside the State of Indiana.

"On the night of the accident in question, the work of the crew consisted of work of the general character described.

"Joseph D. Ryan,
Attorney for plaintiff.
"Harlan L. Hackbert,
Attorney for defendant."

The Court: May I have a copy of that stipulation?

Mr. Ryan: Yes.

Mr. O'Donnell, will you take the witness stand, please?

JACK O'DONNELL, called as a witness herein on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

*Direct Examination by Mr. Ryan.*

Q. Will you please state your name?

A. Jack O'Donnell.

Q. And your address, please?

A. 521 Adams Street, Gary, Indiana.

Q. What is your occupation?

56 A. Switchman.

Q. By whom employed?

A. E. J. & E. Railway, Kirk Yard.

Q. How long have you been in the employ of the E. J. & E. Railway?

A. I entered the service of the E. J. & E. Railway on February 12, 1917.

Q. How old are you, Mr. O'Donnell?

A. Forty-nine, September 22d of this year.

Q. Have you been in the service of the railroad continuously since February 12, 1917? A. No.

Q. Well, you were away how long? A. Well, I entered the armed forces in April, 1917.

Q. You were in the Army in the first war for a couple of years and when you came back you resumed your employment again? A. Yes.

Q. Outside of your being away at that time, have you been in the service continuously? A. No. I was away four years during the—

Q. Pardon me. You were away how long following your entry into service? A. I was two years, while

57 I was in the armed forces in 1917—

Q. Well, then what? A. And I was on leave of absence from 1936, I think, to 1942, four years.

Q. 1936 to 1942? A. Yes.

Q. That is more than four years. A. Excuse me, 1938 to 1942.

Q. Then did you resume your employment? A. I did.

Q. What did you do during the four years that you were absent? A. I was in the State's Attorney's office for four years.

Q. You had another job, not with the railroad?

A. That is right.

Q. And so you re-entered the service on what date actually? A. Well, when I come out of the State's Attorney's office.

Q. Yes. A. Let me see.

Q. I don't suppose it makes a lot of difference. What year was it, about? A. I think it was about 1942. I
58 am not certain now.

Q. Did you work for a few years continuously for the railroad before this accident happened? A. Yes.

Q. You cannot nod. The reporter will have to get your answer. A. I said yes, sir.

Q. On the night in question, what time did you go to work? A. 4 p. m.

Q. By the way, your switching crew consisted of how many men? A. Three men; myself and two helpers.

Q. And you had an engineer and fireman? A. That is true.

Q. They are part of the switching crew, are they?

A. Yes, sir.

Q. How long have you been or had you been on that shift for the 4 o'clock— A. On that particular assignment?

Q. Yes, sir. About how long? A. Two years.

Q. I see. And was your brother, William O'Don-
59 nell, a member of the crew? A. Yes, sir.

Q. Who was the other man? A. John Novicki.

Q. What were your hours, customarily, when you went to work at 4 o'clock? A. 12 o'clock.

Q. It has been stated here, however, that if you finished your work before that, you could go and get credit for the eight hours, is that correct? A. That is true.

Q. You say you had worked with this particular crew, this same crew, for a period of how long? Did you say two years? A. Two years.

Q. With the same crew? A. Not always the same crew.

Q. You see, that was my question. You want to listen to my question, Mr. O'Donnell. You had a particular crew the night in question: Johnnie Novicki, your brother

and yourself and the engineer and fireman. Now, how long did that particular crew work on that particular shift continuously, if you know, before this accident?

A. I can't answer that accurately. The engineer
60 and fireman change occasionally, and the head man changes occasionally.

Q. How long had you worked continuously with your brother as a member? A. Pretty close to two years on that job.

Q. By the way, was your brother older or younger than you are? A. He was younger.

Q. When you went to work, where did you report for work? A. At the switchman's shanty, yardmaster's office.

Q. Is that in proximity to the roundhouse there in the yards? A. Yes, it is.

Q. Where did you get your engine? Do you always get it in the same place? A. In the terminal at the cinder pit.

Q. What was the general character of your work that evening up to the time the last movement was made onto Track 5? A. We classified the cars that had been repaired, and separate those that are not repaired and set back for further repair.

Q. Mr. O'Donnell, you saw this plat of the yard
61 and a number of tracks that are really involved in any way in the work you were engaging in that night. Do you recognize these tracks, beginning with the No. 1 down to No. 5 and No. 6? A. Yes, sir, I do.

Q. And do you recognize the terminal lead and the rip lead extending toward the west? A. Yes, I do.

Q. I assume there will be no question about this. You took cars off of these various tracks and placed them where you wanted to place them, did you? A. Yes, sir, I did.

Q. Were you the conductor of that work on the night in question? A. Yes, sir, I was the foreman.

Q. And is the foreman the same as the conductor?

A. Yes, sir.

Q. And how long had you been the conductor of that crew, all that time you mentioned? A. Yes, sir.

Q. By the way, was your Brother Bill also a qualified conductor? A. Yes, he was.

Q. But he was working as a switchman at the
62 time? Yes, sir, he was.

Q. Getting down to the movement of cars on Track 5, did you place any cars on Track 5 previously to the time of this accident or to the last movement onto Track 5? A. Yes, sir, I did.

Q. Where did you get these cars? A. I got them from the various tracks in the yard.

Q. When you went to work, were you given any orders or directions as to the cars you were to switch that night?

A. Yes, sir, I was.

Q. Was that verbal or written orders? A. Written.

Q. And it was written on what? A. It is written on a form.

Q. What was the name of the form? A. Form 669.

Q. And, by the way, I notice that you, when I wasn't looking, took some memorandum out of your pocket and looked at it; are you looking at the original switch order that you got on the night in question? A. Yes. These are my instructions for January 9, 1946.

63 Q. They are the ones you were to work under on the night of the accident to your brother? A. Yes. These are the instructions.

Q. And do they show what cars you were ordered to switch and where you were to place them and all of that?

A. Yes.

Q. So that you can tell us by looking at that memorandum furnished you by the company just what work you did that night up to the time that you learned that your brother had been killed, is that correct? A. Yes, sir.

Q. Would you tell me approximately how many cars you had taken from these various tracks and placed on No. 5, about how many you had placed on that track?

A. About 43 cars.

Q. And about how many cars does 43 hold—I mean does No. 5 hold? A. They will hold approximately 36 cars, clear, both leads.

Q. What is the average length of the type of car you were handling that night? A. About 45 feet.

Q. And what kind of cars were they principally?

64 A. They were miscellaneous cars, such as hoppers and gons.

Q. What kind of a car is a hopper, for the record, please? A. It is a highside car that is used to load coal and other raw materials.

Q. And by a gon, you mean a gondola, I assume?

A. A gondola. It is a low car.

Q. So these few tracks we have on the drawing there are but a very small part of the yard in question, are they?

Mr. Hackbert: By the way, the drawing has not been identified with an exhibit number.

Mr. Ryan: I will do that a little later.

Maybe the reporter could mark that.

Will you please mark this Plaintiff's Exhibit 1 for identification?

(Said plat was marked Plaintiff's Exhibit 1, for identification.)

By Mr. Ryan:

Q. Just for the benefit of the jury, this yard from north to south, it is about how wide, that particular terminal yard? A. Oh, I would say it is about 250 feet.

65 Q. You mean the whole yard? A. Yes, across the yard there.

Q. 250 feet? A. Or yards, rather.

Q. What is that? A. 250 yards across there.

Q. And how long is it from east to west? A. Well, the track No. 1 there will hold 38 cars spaced.

Q. Jack, I am not talking about what we have here. I am talking about the yard proper.

Mr. Hackbert: Do you mean Kirk Yard, the entire Kirk Yard?

By Mr. Ryan:

Q. The entire Kirk Yard? .A. Oh, the entire Kirk Yard is about two miles, two miles and a half long.

Q. That is east and west, and how wide is it, a half a mile or so? A. Three-quarters or a mile.

Q. In that Kirk Yard are various tracks, lead tracks, repair tracks, cross-overs and buildings like roundhouse and car shops and all that, is that right?

66 A. Yes.

Q. But the place where you were working is cov-

ered by that drawing that is marked Plaintiff's Exhibit 1, is it not? A. Yes.

Q. It shows these Tracks 1 to 5 and, of course, shows they are cut off, they extend on down to the lead to the east end of the yard, don't they? A. Yes, sir, they do.

Q. When you had placed whatever number of cars that you switched onto No. 5 that evening, where did you get these cars? A. I got them out of the east end of 1, 2, 4 and the west end of 1, 3, 4, 6 and also switch 5. To get some bad order cars out of that track—

Q. Will you explain to the jury just how you did that? If I may lead a little, I can hurry it.

Your engine was headed in what direction? A. West.

Q. Did you back in on these tracks when you wanted to pull cars out of the various tracks? A. Yes, sir, we did.

Q. You had to pull west far enough over the switch to enable you to push the cars back or drop them
67 back on the various tracks? A. Yes.

Q. After you had succeeded in getting the various tracks cleared and the cars made up on 5, what was your purpose, what were you going to do with the cars after they made up? A. I was going to pull them down into the train yard.

Q. Did you at any time stretch out that track before you got down to the last movement? A. Yes, I did.

Q. It has been suggested that I might have you explain what is meant by stretching the tracks. Will you explain that? A. I coupled the track, coupling it up.

Q. And then you would move the engine to see that the cars were altogether? A. Yes, sir, I would.

Q. That is what you would call stretching the track?

A. Yes, sir.

Q. Where was your engine when you did that on Track 5? Were you down on the east lead or not?

A. At the time I stretched the track, I was pretty close to the east lead.

Q. Was the engine on the east lead or were you
68 in on Track 5? A. The engine was in on Track 5.

Q. Which end of the track? A. The west end of 5.

Q. I see. And then after you stretched the track, did you determine that these cars were all coupled together?

A. Yes, sir, I did.

Q. Now we are gettting down pretty close to the last movements you made that night. What did you do after you stretched the track? Explain to the jury what movements you made with your engine and what your crew did after this stretching movement. A. I made room for about seven more cars in No. 5, and I realized that 5 was solid and it was filled to capacity; so I went to No. 5 and I stretched the track out and made one or two couplings at the west end of the track. The track was filled to capacity. So I shoved the track in a easterly direction to hold seven additional cars.

Q. Let me ask you right there, Mr. O'Donnell. When you shoved them in an easterly direction so you could get more cars in there, did you have to shove them out, some of the east cars out onto the east lead or
69 not? A. Yes, sir, I did.

Q. But after you got through, how much room was there on the west end of Track 5 for your next switching movement? A. Approximately seven cars.

Q. After you did that, will you tell us what cars you put in there and where you got them and what movements you made? A. I got three hoppers out of No. 4 and three out of Track 3, I think it was.

Q. Did you put them in threes or ones or twos or what? A. Two, one, two and one, I think the cuts were. That is the way they went down into No. 5.

Q. When you say you got them out, three hoppers, that doesn't mean you got the three at the same time?

A. No.

Q. Explain it. My question was, how did you get these cars and what order did you put them in on the west end after you stretched the track? A. I switched them out of 3 and 4.

Q. And how many cars did you put in on each movement? Will you say that again? A. Well, I can't
70 say positively because I just don't remember which track I switched first.

A. No, but how many did you drop in on the west end?

A. Six cars.

Q. Yes. In placing them there, did you put them in threes or twos or ones? A. Two, one, two and one.

Q. You switched two cars in first, is that right?

A. Two, one, two, one.

Q. Is that the order in which you placed them, two, one, and two and one? A. If my memory serves me correctly, yes.

Q. When you did that, when you placed these cars on the west end, were they disconnected and did they move in of their own momentum or did you push them in or— A. I kicked the cars down toward No. 5.

Q. Will you explain what you mean by kicking a car?

A. The car was disjointed from the main train and allowed to run by its own momentum down into the track which it is lined for.

Q. In other words, you have to back in with your engine and pull the car out and then have the engine push the car back in when it is given sufficient momentum to propel the car where you want it to go and the head man, or you, pulls the pin there and you permit the car to roll down on the track where you want it to go, is that correct? A. That is correct.

71

Q. And do the cars usually or in most instances couple to the other car standing on the track when that operation is effected? A. No, they don't.

Q. They do in a great many instances, do they?

A. They do.

Q. Sometimes they do and sometimes they don't, is that what you mean? A. Yes.

Q. In making the last movements, whatever they were, do you know of your own personal knowledge whether these cars when you permitted them to roll down on their own momentum, whether they actually coupled up or not onto those standing on Track 5? A. They did not couple up.

Q. And when did you discover that these cars did not couple onto the ones already standing there?

A. When I was up over No. 1 switch and ready to go into No. 2 and get the last cut of cars.

72

Q. By the way, did the other members of your switching crew know what order these movements were to be made in, or did you direct that work?

A. I was the only one that had any knowledge as to what was to be done and how it was to be done.

Q. After you had made these last movements of these six cars on Track 5, what did you do next and where did you go? A. I went into Track 2.

Q. That is, after you had switched the cars in on No. 5, you went over to Track 2 here somewhere in that vicinity? A. The west end of track 2.

Q. After you had placed these five cars or switched them in onto or toward Track 5, were they all on Track 5 or did and of them extend out on the lead?

A. They extended out on the lead.

Q. About how many of them? A. About three cars.

The Court: That is the west lead, is it?

The Witness: Yes, your Honor.

The Court: West lead.

By Mr. Ryan:

Q. When you went over onto No. 2, where were
73 you with reference to the cars that were then standing on Track 5, and the three of which you say were out on the lead? Where were you with relation to these cars? A. When I was on Track 2?

Q. Yes. A. I was right at the No. 1 switch at the west end.

Q. No. 1 switch is down here, isn't it? A. That is right.

Q. Could you see the cars on Track 5 from that position? A. No, I couldn't.

Q. Did you see your brother William at or about that time? A. Yes, I did.

Q. Where was he when you saw him? A. He was standing with me at the west end of No. 1 switch as we were pulling out of 2.

Q. Did he inquire of you what your next movement was? A. Yes, he did.

Q. And what did you tell him, where it was going?

A. I told him I had one car for No. 5, the balance would go to No. 1, the setbacks would go back into No. 2.

74 Q. And did you have any conversation with him about what he was going to do, or did he state what

he then intended to do, to you? A. He stated that he had some couplings to make in No. 1 at the west end.

Q. Did you at any time notice the condition of the cars on the west end of Track 5 which you say, some of which were on the lead? Did you notice yourself as as to whether they had all coupled or not? A. Yes, I did, before I went into No. 2.

Q. And what was the condition as to these cars? Will you describe their position, the six cars that you last put in there? A. There were three cars on the lead. They were hanging out on the westerly directly on the lead. Then there was an opening of about approximately a car length. Then there was a car standing there and there was another little gap.

Q. And was that the condition of that track at the time your brother stated to you that he had these joints to make, or whatever he stated to you he was going to do? A. That was the condition of the west end of 5.

Q. When you dropped these cars in on the last movements, were they dropped in in the usual and customary speed? A. Are you referring now to the six cars I put into 5?

Q. Yes. A. Before entering 2?

Q. Yes, sir. No, no. Yes. I am talking about the moves you made in there after you stretched the track and placed these three movements. A. I kicked them in there rather rapidly as I usually do.

Q. Were they given sufficient momentum so that they should have coupled onto the other cars? A. That is true.

Q. Do you know why they did not couple on?

A. They collided down on the track, but the coupling didn't make it.

Q. Isn't it a fact that when you are going to couple the cars you have to have at least one of the knuckles open? A. That is true.

Q. Was one of the knuckles open in each instance when you dropped the cars down in there, or do you know about that? A. The knuckle would have to be open when I let go of the car.

Q. But, nevertheless, they did not couple?

A. That is true.

Q. Did you know when your brother told you that

he had to make these couplings what he had to do of necessity? A. Yes, I did.

Q. What did he have to do in order to do his job efficiently and correctly? A. He would have to go in and open the knuckles and adjust the drawbars.

Q. When you say he would have to go in, what do you mean by that? A. He would have to go in between the tracks.

Q. Between the tracks. By going in—to open the drawbars, what do you mean? A. He steps out, outside of the track, into the center of the track.

Q. Do you mean in between the cars, is that what you are trying to say? A. That is right.

Q. Why couldn't he open them from the side with the pin lifter? A. If the knuckle is in operation you can; but when the cars impact often it throws
77 the drawbar off center which makes it necessary for you to go in there and center the drawbar before coupling can be made.

Q. Then after you had that conversation with your brother, what was the next movement you made?

A. I pulled up.

Q. Wait a minute. You backed the engine down out of what track? A. No. 2.

Q. How many cars did you tie on? A. Twenty-four.

Q. Will you look at the list and tell us whether it was 24 or 26, Jack, please, or 28? A. Twenty-four cars.

Q. And in order to get these 24 cars out of track 2, you had to get the cars down beyond the terminal lead switch, the end of the most easterly car west of the terminal switch? A. West of the rip track lead switch, not the terminal lead switch.

Q. Will you show the jury where the rip track lead switch is? A. Right here (indicating).

Mr. Hackbert: Will you mark it with a letter?

78 By Mr. Ryan:

Q. Will you mark it with a letter A?

Mr. Ryan: Is that all right?

Mr. Hackbert: A will do.

Mr. Ryan: All right. We will mark it A.

(Mr. Ryan marked the plat, Plaintiff's Exhibit 1 for identification, accordingly.)

By Mr. Ryan:

Q. You had to get it over that switch? A. Yes.

Q. In order to get the end of the most easterly car of the 24 over that switch, so that the cars could be switched back, the engine would have to be down 24 car lengths toward the west, wouldn't it? A. That is correct.

Q. That would put the engine out of this end of the lead, this No. 27, wouldn't it? A. Yes, sir, it would.

Q. And in order for you to transmit signals from where you were down near Track 2, where would you have to go, where would you have to place yourself?

A. I walked in a westerly direction as the cars were pulling out.

Q. What is the fact as to whether you were sup-
79 posed to keep your enginemen in view with your lanterns while walking at night?

Mr. Hackbert: I object to that question as leading.

The Court: You may answer.

Do you understand the question, Mr. Witness?

The Witness: Yes, I do.

The Court: You may answer.

By Mr. Ryan:

Q. What was the condition of the yard there at that time as to whether you could see the engine clearly or if there was any obstruction to your view? Will you explain that? A. As the engine goes in a westerly direction down the 27 lead, there are utility poles north of 27, and as he pulls up that track there occasionally one of those poles, as he passes it, obstructs or obscures his view of me.

Q. Where is the head man at the time? Where is the man following the engine at that time? Does he follow west? A. He was standing about ten feet from me.

Q. And that was Mr. Novicki?

80 A. That is right.

Q. There came a time now when you, I assume, gave a signal to stop the movement toward the west, did you? A. I gave him a signal to stop.

Q. And where was the most easterly car at the time he finally did get stopped? A. He was up on 27.

Q. Do you mean he had passed a considerable distance west of the point you had indicated on the map?

A. That is true.

Q. How did that come about? A. He had difficulty getting my signal to stop.

Q. Was there any other reason why it was difficult to see your signal at that time other than the posts you mentioned? A. Yes.

Q. What was it? A. A southerly wind was blowing the smoke over from Yard J down on 27 lead.

Q. Didn't the head man get up closer to the west end where he could transmit your signals? A. Yes, he did.

Q. When was it he was only ten feet from you?

81 A. As we were pulling out of the track.

Q. Where was he at the time you gave him the signal to stop? A. He was upon 27, passing signals.

Q. And was he upon 27 when you got him stopped?

A. Yes, he was.

Q. And then what was your next—what was your next signal? A. A back-up signal.

Q. And did you have a car in that cut that was to go in on Track 5, Mr. O'Donnell? A. Yes, I did.

Q. Which car was it? A. It was the east car.

Q. It was the end car, was it? A. Yes.

Q. Did you intend to drop that car and let it run in on its momentum against the other cars or did you intend to push it? A. I intended to shove it in.

Q. And close up the gaps and couple up the cars, is that right? A. No, I did not intend to do that.

Q. What did you intend to do? A. I intended

82 to cut the car off on the lead and dispose of the balance of the 23 cars, and then go into No. 5 and couple it.

Q. There came a time as the engine pushed the 24 cars eastwardly toward the other cars on No. 5 when you gave a signal to slow down or stop, did you? A. I did.

Q. And where was the end car with relation to the most westerly car on the lead that protruded out from Track 5 when you gave the signal to slow down?

A. Can I show it on the map there?

Q. You can tell us without—it will be hard to remember all that. A. It is inside the lead I started switching down, before the car started clearing the inside lead.

Q. Do you know if the signal was relayed by the head man to the engineer? A. Yes, it was.

Q. Was the signal responded to immediately or not?

A. No, it was not.

Q. Do you know how that came about, Mr. O'Donnell?

A. I don't know. He just didn't stop.

Q. There came a time when he was getting rather close. What did you do then? A. I run out on the
83 northwesterly direction, out there in the weeds and started washing him out, trying to get him stopped.

Q. By washing him out, tell us what you mean.

A. I was giving him a violent stop sign.

Q. Is that what you call, in railroad parlance, a washout signal? A. That is correct.

Q. Will you tell us what a washout signal is? Will you describe what a washout signal is? How is that given?

A. It is a very violent stop sign.

Q. I know, but how do you swing the lantern? The jury are not railroad men. They will want to know what a washout is. A. You have ahold of your lantern and you swing it like this in a violent manner.

Q. You are standing up in front of where you were seated in the witness chair and swinging your lantern across in front of you in a half circle rapidly and hurriedly, is that correct? A. Yes, sir.

Q. Is that what you call a washout signal?

A. Yes, sir.

84 Q. You may be seated.

What is the ordinary stop signal when you want the engine to stop, in the ordinary manner?

A. In switching, you give one sign like that and he stops.

Q. One sign across in front of your body?

A. That is right.

Q. And what is a slow-down sign when you want the engine ot slow down preparatory to coupling? A. You hold your lantern out.

Q. At arm's length? A. That is correct.

Q. And you use lighted lanterns, of course, in switching at night? A. Electric lights.

Q. What is the color of your lights? A. A clear white light.

Q. There came a time when you gave him that signal which you have described as a washout signal. How close was he to the most westerly car standing out on the lead, extending out west from Track 5?

Mr. Hackbert: You say how close was he?

Mr. Ryan: How close was he—I don't wish to lead you on that.

85 Strike that question.

Q. When you gave the washout signal to stop, where was the most easterly car, the one you wanted to place on Track 5, where was that car with relation to the most westerly car you had left there of the six?

A. I want to get this clear in my mind. When he obeyed my signal and it stopped? I was giving signals from the time that car started in at the west lead and it was being pushed down that lead for about four car lengths and he wasn't stopping.

Q. You hadn't given the washout yet? A. I started giving the washout after I gave two stop signs.

Q. I didn't understand you. Then where did the cars stop? Where did the engineeer apply his brakes or attempt to stop, could you tell from the movement of the train? A. Certainly.

Q. Where was he? A. The east car of the cut which I was switching was almost down to the car that was standing on 5 when he stopped.

Q. And what was his manner of stopping, will you describe how he stopped? A. He answered my signal. He stopped violently.

86 Q. And what happened when he stopped violently?

A. The coupler fractured or broke.

Q. On which car? A. The second car from the east end of the cut that I had ahold of.

Q. Not the one you intended to place on that track, but the second car? A. Second car.

Q. And which coupler was it, was it the coupler on the west end of the second car that broke? A. The coupler on the west end.

Q. And when the coupler on the west end broke and the cars moved away, what did the cars do, do you know? A. They run down, those three that were standing there on 5, hanging out on No. 5.

Q. How fast in your judgment were these cars moving at the time the engineer came to a sudden stop there? A. I would say about ten miles an hour, at least that.

Q. When the two cars broke, were they impacted against the other cars? A. Yes, sir, they were.

Q. And can you describe the movement, the noise, as to whether it was a forcible impaction or not?

87 A. It was a forcible impacting.

Q. Do you know what it did to these other cars when these two hit them? A. It propelled them in an easterly direction and closed the two gaps, on the east end of Track 5.

Q. Did you know where your brother was at the time that that coupler broke? A. No, I did not.

Q. How long was it after he told you that he was going down to open these knuckles that this coupler broke? How long a space of time elapsed, would you say? A. Well, it wasn't very long because Bill stood with me—

Q. It is all right, but without explaining it, I would like to have an answer to that question. From the time you told him that that one car was to go in there and he explained to you he had these knuckles to open, how long a time would you say elapsed? A. Two, three or four minutes.

Q. What was the next thing you did after that coupler broke and after the engine stopped? A. When I heard the coupler fracture, why, I pulled ahead in a westerly direction.

88 Q. And did you place any other cars in on Track 5 at any time? A. No, I did not.

Q. Isn't it a fact that you had another car to go in on that track, or is it a fact? A. After I had completed my work, I set a car on the lead there.

Q. What kind of a car did you set on the lead?

A. I just don't recall. I think it was a dump car, an ash car or a dump car.

Q. Did you have any cars that was to go in on Track 5 which was to go out with that train? A. No.

Q. Did the car that you set out on the lead, was it placed anywhere near the cars on Track 5 including the two that were on there with the knuckle broken?

A. It was set up west of it, at about between four and five switches, on the west lead.

Q. How far would that be from where the end car was, the car that the coupler broke on when you placed it? A. About two car lengths west of that.

Q. Did it at any time impact against these cars or move them or touch them? A. No, sir.

89 Q. On Track 5? A. No, sir.

Q. What was the next thing you did after you placed that car on the lead as you have explained?

A. I went around the east end to pull the track.

Q. Is that what you call going around the horn?

A. That is correct.

Q. Will you tell the jury how you got around to the other lead? Just explain the way the tracks run.

A. It is a large circle, somewhat like that barrier there. You go around there in a circle, like that, and you come right back on the east end of the yard.

Q. When you are working here on any of these tracks, you go onto the running track, on 27, and you start around? A. Yes.

Q. And you go on and go around and make a complete circle? A. And turn the engine as you do it. The engine turns.

Q. In making the complete circle, you have your engine now headed in a northerly direction or in an easterly direction? A. Well, the engine is backing up in

90 an easterly direction, and then as you hit this curve, why, you start up north and come back northwest and then you back right in, in a westerly direction.

Q. When you got over to the lead on the east end of the lead and you backed in onto the east end of the train of cars on Track 5, did you back in or head in?

A. Backed in.

Q. What direction was your engine facing then when you backed in? A. East. It had been turned.

Q. It had been turned completely around? A. Yes.

Q. Then what did you do with that train? A. I coupled into No. 5 and pulled it.

Q. By the way, at the time you set out that last car, that rubbish car or cinder car, whatever it was, did you receive or see where your brother was, or receive any signal from him? A. No, I did not.

Q. Wouldn't the crew customarily ride around the horn with you when yau are going around to the east end to pull that track? A. Not always.

91 Q. How would they go down there? A. The head man would ride around with me and the field man occasionally would walk up to the east end.

Q. That is, from where he had been working on 5 while you had been going around the horn? A. That is correct.

Q. You did not think anything about your brother's safety at that time?

Mr. Hackbert: I think—

The Witness: When the couplings were all made—

Mr. Hackbert: I object to that.

Mr. Ryan: I will withdraw it.

The Court: Let it be withdrawn.

By Mr. Ryan:

Q. Were you concerned at all about your brother when you went around the horn to pull your track?

A. I was concerned when I pulled—

Q. No, you are not listening to the question. When you and the head man went around the horn to pull your train out of there, you didn't know where your brother was, did you? A. No, I didn't.

Q. Wasn't he supposed to ride on the engine with you? A. No, sir. Occasionally he would walk up to
92 the east end of the yard.

Q. You mean he would walk up between the tracks from where he had been working? A. That is true.

Q. Then were you or were you not concerned about him at all at that time?

Mr. Hackbert: I object to the use of the word "concerned." That has too many implications.

Mr. Ryan: This man was foreman of the crew and as such responsible for his crew members. I think under the circumstances, since they were operating under his orders at that time and place, he mght state why it was that he directed that operation to the east out of Track 5 without knowing exactly where a crew member, his brother, was.

Is that your question?

Mr. Ryan: Virtually.

The Court: Do you understand the question?

The Witness: Yes.

The Court: Answer it then. Overruled.

The Witness: I was not concerned about his safety at that time.

By Mr. Ryan:

93 Q. And the reason for that was you figured sometimes he walked—

Mr. Hackbert: I object to it.

The Court: Sustained, sustained. You cannot testify.

By Mr. Ryan:

Q. Had you finished your switching operations at that time except to move the train down to the other yard?

A. That is right.

Q. And when you backed into the east end and pulled the train out, did you accompany it down to the other yard? A. No, I did not.

Q. Where did that engine go then? A. It went back around this horn and on down to the train yard, into Yard L.

Q. At any time before you pulled out from the east end of the yard did you ascertain whether all the cars on Track 5 were coupled together, including the one that you wanted in the train, the last one you moved in there where the coupling broke? A. Yes, I looked over the couplings at the west end.

Q. How did you do that? A. When I had completed my work, I come down to No. 5.

94 Q. When you say you completed your work, what work have you in mind? A. At the west end, I was then finished—

Q. That is, when you set out that car on the lead?

A. I put my cars into 1 and 2.

Q. That is, you distributed your 23 cars, whatever you had left, or 22? A. That is right, and then I shoved down toward No. 5 to see what the damage was.

Q. What the damage to what was? A. From the broken coupler.

Q. Yes. A. I didn't know. The car I pulled out that was on the east end of my cut was O.K. Experience told me that the drawbar was either pulled or fractured on the car that was then down in 5.

Q. Did you look at the coupler? A. I did.

Q. What was the condition of the coupler? A. It was completely fractured; that is, the lip of the coupler, the knuckle—

Q. By fractured, do you mean broken? A. Yes, it was broken right off.

Q. Was it together in its place or had it dropped
95 down on the ground? A. It had dropped down in the center of the track.

Q. Part of the broken part? A. That is right.

Q. And what did you next do after you saw that?

A. I examined the coupler and I decided to take the pin out and put a new knuckle in, and so I stretched 5 out.

When I attempted to remove the knuckle pin, it had a cotter-key at the base of the pin which locked the pin in there.

I picked up a bolt and I attempted to knock out that cotter-key. In the meantime, the head man came up and held my lantern for me. I did not have any success removing the cotter-key and I told Johnnie, "Forget about it."

I said, "Johnnie, I got a car for the terminal lead. Bill tells me there was two couplings in this track. He is not here. I am going to look to see if those couplings were made, and I will meet you over in the terminal yard. Shove that car over around toward 2 terminal."

Q. Then where did you go from there? A. I proceeded up the west end of No. 5 and I examined the
96 couplings to see if they were made.

Q. That is, you mean you walked alongside of

Track 5 in between Track 5 and the other track, No. 4? A. Yes, I did.

Q. Were your men working from the north side of the train where you were working that night?

A. Yes, sir.

Q. In other words, the engineer is on which side of the engine? A. On the north side.

Q. The engineer is always on the right side? A. Yes.

Q. And the engine facing west, of course you would be working from the north side of the cars, is that correct? A. That is right.

Q. So when you walked down there, you had your lantern lighted, did you? A. I did.

Q. And you walked down for what purpose, to see that the cars were coupled or what? A. To see if they were coupled.

Q. Did you look? Did you see that all of the six cars that you had put in there in the three separate
97 movements were coupled to those that had been previously standing there? A. That is true, they were coupled.

Q. Did you see your brother at that time? A. No, I did not.

Q. Just what sort of a view did you make of the ends of the cars? What kind of an inspection did you make? Did you just look at the couplers? A. I put my lantern in there and examined the couplers.

Q. Just to see they were coupled? A. To see the knuckle locks were down. I could tell by looking at them whether they were coupled.

Q. Did you have to make a minute inspection, or was that just by a glance? A. I could tell that almost at a glance.

Q. Did you at any time look under the cars or have any notion at that time that anything had happened to your brother? A. No, I didn't.

Q. Then after you did that, what did you next do?

A. I crossed over to No. 2 terminal.

Q. And what next? A. I shoved the cars into No. 2 terminal.

Q. Then what? Just tell on and tell us the next
98 thing you did? A. And I came back up the lead, that is, the terminal lead, and shoved into No. 1 and coupled it up.

Q. There came a time when you got on the engine and went around the horn. Was the last thing you did the placement of the rubbish car on the lead? A. On the lead.

Q. What lead? A. The west rip lead.

Q. That was not on Track 27, in your way? A. No, sir.

Q. After you got around the horn and backed into the cars on No. 5, did you accompany that train of cars to the other yard or to its destination? A. I did not.

Q. Where was that customarily to go to, that other train, that train? A. Down to the train yard, Yard L.

Q. How far was that from the east lead where you coupled on? A. About a half a mile.

Q. And at that time when the engine coupled on and had started for its destination, who was there besides you, if anyone? A. Just me.

99 Q. Where was the head man at that time?

A. He was at the east gate lining up the switches.

Q. Was there anything further for you to do on that movement to the terminal yard? A. No, that is, just pull those cars.

Q. Wouldn't you customarily accompany the train to that yard, or did you? A. I would cross over and get in front as it pulls into Yard L.

Q. After the train started, after the engine tied on at the east end and started up, what did you next do?

A. I walked over to the yardmaster's shanty.

Q. For what purpose? A. To make out the report.

Q. What kind of a report? Do you mean about the broken coupler? A. No. The work report on the cars that are on the various tracks that I leave standing there.

Q. You still had not seen your brother? A. No.

Q. All right. After you made out your report, what did you do? A. Before making out my report, I looked for Bill.

100 That is what I am trying to get you to tell me, what you did, movement by movement, without leading you.

After your train started for its destination and you say you did not accompany it, tell us what you next did after that. A. I walked in the yardmaster's shanty to make out my report and look for Bill, but Bill was not in the shanty.

Q. You did not tell us that before. You did not see Bill in the shanty, did you? A. That is correct.

Q. What did you do then? A. I asked one of the switchmen there if he had seen Bill and he said no.

Q. Well, then what did you do? Go ahead and tell us.

A. So I walked back to the east rip yard, and 5 was still pulling out, and when the cars pulled out of No. 5 I crossed over to No. 1. I though maybe he had been walking up No. 1. And he wasn't there.

Q. All right. Then what? A. I walked back to the switch shanty again and he wasn't in the switch shanty. I made inquiry whether or not he had been around, and I became alarmed, and I thought possibly he 101 might have gotten on the cut and rode down to Yard L with it.

I went back to the shanty again and he wasn't there. I walked back over to the east end of the rip track again, looking for him, and I was in there when I met the engineer at the terminal—

Q. Where did you go from there? A. I stood there, and when the engineer came back after delivering that cut of cars to Yard L, I asked him if he had seen Bill, and he said no.

Q. Then what did you do? A. I said, "There is something wrong."

Q. Now, Mr. O'Donnell, please don't show any evidence of emotion. That won't do.

You did finally go back to where he as last supposed to do his work, didn't you? A. Yes.

Q. When you went back to Track 5, was anybody with you? A. The engineer.

Q. And now just try and pull yourself together. We can't have any more of that, Jack, at all.

You just tell us just what you saw, describe what you saw when you got back to Track 5. Just tell
102 us about that. A. I told Pete—that is the engineer's name—Christianson—

Q. I am not so anxious now to have you tell me what you said to anybody. A. I said, "We will walk down No. 5."

Q. Tell us what you did. A. We walked down No. 5 and I recall that I had that one move on the east end of 1, and I told the engineer, I said, "The only two moves that have been made on the west end of the yard is where the coupler broke on 5 and where I made the coupling on No. 1 at the west end when I completed my work."

And then I got down into 5, almost to the west end, I told Pete, "You continue down 5 and I will cross over to 1 and look under these cars and around the cars to see if Bill is there, and you continue down No. 5."

So I walked over to No. 1 and I looked under those ten or twelve west cars. When I got to the west end of 1, I met the engineer and I said, "Did you see him, Pete?"

He said, "No." He said, "Let's go over to the shanty."

103 I said, "No, I won't go to the shanty. I want to walk down No. 5, from the west end to the east end."

So I got in the center of the track—

Q. At that time—now, just a minute.

At the time you got over to No. 5 track, you can tell us what you saw, but first answer this question. Had the cars that were on No. 5, all of the cars, been pulled off out to the east when you went over there and found your brother? A. I was—

The Court: We will recess for ten minutes.

(Recess taken.)

The Court: You may proceed.

By Mr. Ryan:

Q. Mr. O'Donnell, you told us about where you looked and where the engineer looked. Did you go back to Track 5 and find your brother? That is the question.

A. I walked up 5 and found him.

Q. Will you describe just what you found, what kind of marks, if anything, you found, between the rails? Just describe everything you saw there.

First, before we talk about your brother—

A. His lantern there was laying—there was a 104 safety sign in the center of the rail there.

The Court: A Safety Sign?

The Witness: Yes, your Honor, a safety sign that they set up in the center of the track while the workmen were working, and then after the work is completed, that sign is put down in the center of the track—

By Mr. Ryan:

Q. That was down while you were working on the track? A. Yes.

Q. And it was still down when you saw it? A. Yes.

Q. What if anything did you notice on the ground or between the rails? A. His lantern was right there at the safety sign with the handle severed off.

Q. Yes. A. I looked from there upon the north rail and I could see a little shadow about 45 feet from that point.

Q. What did you see if anything in the way of brush-marks or anything else? A. I didn't examine the brush-marks at that time.

Q. Did you at any time examine the brush-marks before there was any further movement of that train? 105 A. Yes, I did.

Q. When was it? A. I was waiting for the ambulance to come and pick him up.

Q. Tell us where your brother was when you saw him and what part of the premises he was on and what his physical condition was. A. He was lying across the north rail, flush up against the rail.

Q. Which way was his head facing? A. His head was facing south. It was right up against the rail.

Q. Where were his arms and— A. His right arm was over the rail.

Q. Was it severed? A. It was severed.

Q. Any other part of his body or limbs? A. His right leg was over the rail and severed right through here, and his face was completely severed.

Q. And he was dead, of course, when you saw him?

A. He was dead.

Q About what time was it when he went over to Track 2 to ask you what the next movement was?

A. It was around 8 o'clock.

106 Q. What time was it when you pulled out the train at the east end when the engine backed in and pulled it out? A. About 8:30.

Q. Or perhaps 9 o'clock, wasn't it? A. No, 8:30. About 9 o'clock when the engine came back to the terminal.

Q. It was about 9 o'clock when you found your brother? A. Yes, that is correct.

Q. So he was absent at least for an hour that you didn't see him at all? A. That is correct.

Q. By the way, what is the character of that yard there? Is there a grade there anywhere in the yard?

A. The cars are inclined to run in a westerly direction in the yard. That is—

Q. There is a very slight grade toward the west, or incline toward the west? A. That is true.

That is uniformly true at the place where you were doing the work? A. That is true.

Q. By the way, in so far as you know, nobody saw your brother at the time he was run over? A. No.

107 Q. During the years that you have known him and worked with him, what were his habits with reference to using care for his own safety and the safety of his other men? A. He was industrious, sober and efficient, a safe worker.

Q. Did he ever have any other accident or injury to your knowledge? A. No, sir.

Q. About how tall a man was he? A. About 5 foot, 8.

Q. After the ambulance came, I have to ask you about this again, after the ambulance came and took him away, did you with some other employee make a minute inspection of the track showing where he was run over and whether he was dragged or not? A. Yes, I made the inspection with the yardmaster.

Q. What was his name? A. Ralph Robertson.

Q. Sir? A. Ralph Robertson.

Q. And what marks did you see on the track indicating where he was hurt? A. In the center of the track at the safety sign you could see his footmarks south
108 of the safety sign.

Q. What else did you see there? A. There was a piece chipped out of the safety sign. Then north of the rail you could see where he had dug his hands, fingers, into the dirt in an attempt to get clear.

Q. You can't— A. His hand marks were there.

Mr. Hackbert: I move to strike that.

The Court: It may be stricken.

Mr. Ryan: I will agree with that.

Q. How far did these marks continue? A. You could see where his clothing and his body had made the marks for a distance of approximately 45 feet as he was propelled along the north rail before his body come to rest.

Q. At the time you made that inspection, how long was that after the ambulance took his body away, Jack?

A. Due to some confusion, the ambulance did not arrive for an hour, so I was with the body, and the yardmaster, for a solid hour, waiting for the ambulance.

Q. You did not accompany the ambulance; you stayed there, did you, after the ambulance took him away?

A. No, I walked down with the ambulance, but I
109 made this inspection while I was waiting for the ambulance, pretty close to an hour. When the ambulance arrived, I walked back—

Q. Were there any other cars at or near the place at that time where you made the inspection and where these marks were found? A. The track was clear.

Q. This other car, this dump car you placed, was that west lead, back away from 5.

Mr. Ryan: I would like to have these photographs marked Plaintiff's Exhibits 2, 3, 4, 5 and 6, for identification.

(Said photographs were marked, respectively, Plaintiff's Exhibits 2, 3, 4, 5 and 6, for identification.)

By Mr. Ryan:

Q. Mr. O'Donnell, I will ask you to look at these photographs marked, respectively, Plaintiff's Exhibits 2 to 6, for identification, inclusive, and ask you to state if

they correctly show the tracks that we have been mentioning here, No. 27, the running track, the rip lead, the terminal lead, and Tracks 1, 2, 3, 4 and perhaps 5. Do they show these with the camera facing eastward?

110 A. Yes, sir, they do.

Mr. Ryan: There are cars on the tracks there, and they are not introduced, your Honor, with the view of showing the actual conditions as to any car that might be on the tracks, but for the purpose of showing the tracks and the switches that we have been speaking of.

The Court: Has counsel seen them?

Mr. Hackbert: I have not. They were taken too late.

The Court: Suppose you look at them and then be prepared, if you have any objections, to voice them in the morning. I will rule on them then.

You are offering them at this time?

Mr. Ryan: Just as soon as counsel looks at them.

The Court: I told him he could look at them and then voice his objections in the morning.

Mr. Ryan: I have just a question.

There is a legend on the back of each photograph. The first one shows the camera was placed in the center of Track 27, facing east approximately 25 feet west of the terminal lead switch. That is a correct legend as to where the camera was placed?

The Witness: Yes.

By Mr. Ryan:

111 Q. That shows that track A. Yes.

The Court: How is that one marked?

Mr. Ryan: Plaintiff's Exhibit 2.

The Court: Very well.

Mr. Hackbert: Do I understand you are offering the legend on the back as well as the photographs?

Mr. Ryan: Yes. I will offer the photographs, including the legends on the backs.

The Court: Suppose we let him look at them over night, and he probably, if they are accurate, stipulate as to them in the morning. Let him come in with them in the morning. Are there any other questions on direct?

Mr. Ryan: Your Honor, I think I have covered pretty near everything.

The Court: I think you would rather start your cross examination in the morning.

Mr. Hackbert: Yes.

The Court: If you think of anything between now and morning, I will let you resume your direct in the morning before he starts his cross examination.

Mr. Ryan: Thank you.

The Court: The jury at this time are instructed
112 they are not to discuss this case with anyone, or among themselves, nor are they to come to any conclusion in the matter until they have heard all of the evidence, the arguments of counsel, on both sides, and the instructions of the court, and then retire to their jury room to deliberate upon their verdict.

Those instructions will be followed and the jury will be permitted from time to time to leave and to resume the following day.

Is that clear to the jury?

Very well. With that admonition, we will adjourn at this time until 10 o'clock tomorrow morning.

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(Whereupon the further tiral of the above-entitled case was adjourned until 10 o'clock A. M. of the following day, Tuesday, September 30, 1947.)

113 In the District Court of the United States
For the Northern District of Illinois
Eastern Division

• • (Caption—No. 46 C 1493) • •

Before Campbell, J. and J.
Tuesday, September 30, 1947,
10 o'clock A. M.

Trial resumed pursuant to adjournment.

Present: Same as before.

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The Court: Did you have any more questions on direct examination?

Mr. Ryan: There is just a little, your Honor, two or three questions.

The Court: You may continue the direct examination.

114 JACK O'DONNELL, resumed the stand and testified further as follows:

*Direct Examination (Continued).*

Mr. Ryan: We were on the photographs, your Honor.

The Court: Yes. Have you examined them, Mr. Hackbert?

Mr. Hackbert: I have, and with the exception of one of them, which is a rather faulty exposure, I have no objection, and I think if Mr. Ryan proposes to use that one, that if it is simply stated to the jury that it does not correctly represent the atmospheric conditions at the time but that the cloudiness in the picture is the result of faulty exposure or development—

Mr. Ryan: I agree to that. That is quite evident. It is evident from the other pictures that it is due to faulty exposure. That is Exhibit 5.

The Court: As to Exhibit 5, the jury is instructed that the cloudy condition is because of faulty exposure of the photographer and does not properly represent the atmospheric conditions.

Mr. Ryan: Otherwise, it is correct as to the physical facts.

Mr. Hackbert: Yes.

The Court: Very well.

115 On stipulation, Plaintiff's Exhibits 2 to 6, inclusive, are received in evidence.

(Which said photographs, so offered and received in evidence, were marked, respectively, Plaintiff's Exhibits 2, 3, 4, 5 and 6.)

116 Mr. Ryan: Your Honor, do I understand, whether I formally offer the plat in evidence, it is understood it is in evidence?

The Court: You have not offered it as yet.

Mr. Ryan: I am offering the plat.

The Court: Any objection to the plat?

Mr. Hackbert: No.

The Court: Plaintiff's Exhibit 1 is also received in evidence.

(Which said plat, so offered and received in evidence, was marked Plaintiff's Exhibit 1.)

117 By Mr. Ryan:

Q. Mr. O'Donnell, one or two things. You spoke of a safety sign that was between the rails. Where was that safety sign with relation to the switch leading onto Track 5 from the rip lead? A. Well, from the switch it would be just inside the clear of the lead on 5. Now, from that clearance point to that switch I would say is about 65 feet.

The Court: Is that the west lead?

The Witness: The west lead, your Honor.

Mr. Ryan: Your Honor, there is a little confusion about these leads. No. 5—

The Court: There is one east and one west, is that right?

Mr. Hackbert: The east lead is at the east end of the yard a half a mile or more away.

The Court: That is right, on either side of Track 5.

By Mr. Ryan:

Q. Will you indicate on Track 5 where the safety sign was down between the rails? Could you put a little X across the rail, if you will?

A. It was just in the clear on this lead here. Right in the center of the track on No. 5, right clear of this
118 lead.

Q. Will you extend your cross over the white rail so that the jury can see it? A. Right there. Here is the switch you asked me the distance from and it is approximately 70 feet from this switch up to where the sign is to the clear on 5.

Q. Where did the brush marks commence with relation to the sign?

A. Right at the sign.

Q. When you previously stated that you saw a couple of openings in the last cars that had been shunted in there, where was the most westerly opening, as you recall it?

A. The opening started right there at the sign, the position of the sign.

Q. By the way, had the coupling not broken on the second car from the end of the cut that you were moving, where were you going to place that car?

A. Cut it off on the lead there.

Q. On the car where the coupler broke, where were you going to put that car?

A. That car was a car that was to go to No. 1.

Q. Can you give the rate of wages switchmen
119 were receiving at the time of this accident, switchmen and conductors?

A. The helpers' rate was $9.60 for eight hours.

Q. What was the conductor's rate at that time?

A. $10.19.

Mr. Hackbert: I object to that on the ground that would be immaterial because it shows the man had been a helper for two years.

The Court: Sustained.

Mr. Ryan: I don't understand the objection, your Honor. I propose to show that wages have been increased since that time and I want to show what the wages were at the time of the accident and what they were the following May.

The Court: You may show them for a workman in his particular category at the time of the accident. He was not a conductor

Mr. Ryan: Yes.

The Court: That is your objection?

Mr. Hackbert: Yes, that he is not a conductor.

The Court: The objection is that the conductor's wages are not material. Sustained.

Mr. Ryan: He was a qualified conductor.

The Court: He was not acting as such at the
120 time of the accident.

Mr. Ryan: But he could act as such.

The Court: I have already ruled on the objection.

Mr. Ryan: Then your Honor rules I may not show the wages of conductors at that time?

The Court: Not after the ruling.

By Mr. Ryan:

Q. What were the wages of a helper at that time?

A. $9.60.

Q. And was there any change in the rate of pay since that time up to the present?

Mr. Hackbert: I object to that as immaterial.

The Court: Overruled.

Mr. Ryan: You may answer.

The Court: That is the rate of pay for helpers.

The Witness: The pay was increased in 1946 to $11.27 for a helper.

The Court: That is per day, an 8-hour day?

The Witness: Yes, your Honor.

Mr. Ryan: I think that is all. You may cross examine.

The Court: Very well. Cross examine.

121 *Cross Examination by Mr. Hackbert.*

Q. Mr. O'Donnell, while we are at it, the stop sign shown on Plaintiff's Exhibit 5, which appears to be fastened to the rail there, consists of a target with the words "Danger—Stop," that is not the kind of stop sign that was being used at the time of this accident and it isn't the kind you were describing?

A. No, sir, that is not the kind.

Q. This is a kind that has come into use since the time of the accident?

A. Yes, that is correct.

Mr. Hackbert: Will you mark this Defendant's Exhibit 1 for identification, please?

(Said photograph was marked Defendant's Exhibit 1 for identification.)

By Mr. Hackbert:

Q. Mr. O'Donnell, I show you what has been marked Defendant's Exhibit 1 for identification and the object

which appears lying on the ground in between the two rails in the center of the picture is the stop sign that you refer to, is it not?

A. That is correct.

Q. And that stop sign consists of a board which
122 is perhaps a foot and a half or two feet square, approximately square, rectangular, or a standard, and which is located in the center of the track, and then located a short distance away is an iron rod with a hook on the end, and when the sign is up the two stand up and are hooked together at the top, is that correct?

A. That is correct.

Q. When you are switching over those tracks they are unhooked and both lie flat on the ground?

A. Yes.

Q. The sign folds down toward the west and the hook folds down toward the east at this particular location?

Mr. Ryan: Is that last question answered?

Mr. Hackbert: No, he is thinking.

The Witness: Will you repeat that question?

The Court: The reporter may read it.

(Question read.)

A. That is not true—

By Mr. Hackbert:

Q. And will you—

The Court: Finish your answer.

The Witness: There are occasions when they drop the main sign to the west and other occasions they will drop it to the east.

123 By Mr. Hackbert:

Q. Well, perhaps I can clear it up this way, Mr. O'Donnell. The sign is fastened to the ground at a point west of the point at which the rod and hook are fastened to the ground in this particular location?

A. That is correct.

Q. And when they are both folded out, the sign goes to the west and the hook goes to the east?

A. No, I disagree with you. They let them drop east on occasions and let them drop west, the main sign,

because it is nailed down to the tie, and it is free to fall by its own gravity. If he lets it go to the east it will fall to the east, and if he lets it go to the west it will fall to the west.

Q. Do you remember which way the signboard had fallen this particular night?

A. To the east.

Q. To the east?

A. I am pretty sure.

Q. And that signboard is about how high from the ground?

A. Oh, it would be about the space of that cardboard there, maybe not that high.

Mr. Ryan: What part of the cardboard? Pardon me.

124 The Witness: I say the face of the sign when standing erect would be right about here.

By Mr. Hackbert:

Q. About 2½ feet above the ground?

A. Yes, about 2½ feet.

Q. The sign is a foot or a foot and a half high?

A. Maybe it is 8 inches, 7 inches. I don't know.

Q. And when you say that the brush marks began opposite the sign, you mean they began opposite the place where the sign was lying on the ground?

A. That is correct.

Q. You had been working on this job with your brother as a member of your crew for about two years prior to this time, is that correct?

A. That is correct.

Q. How long had you been employed by the E. J. & E. as a switchman?

A. About 23 or 24 years.

A. And had he worked more or less continuously during all that period of time?

A. Yes, sir.

Q. I assume there were periods when he may have been gone, just as you were?

A. Not to my knowledge.

125 Q. He had worked continuously as a switchman for 23 or 24 years?

A. That is correct.

Q. He had worked on this particular job continuously for a period of about two years?

A. That is correct.

Q. Had he had any other service on this repair track job other than that two-year period?

A. I think he had worked on the job on other occasions.

Q. Do you know about how much that service would total altogether?

A. I haven't the remotest idea, but—

Q. In any event, he had worked for about two years steadily prior to the time of this accident?

A. He helped me two years.

Q. During the time that he worked on this job, was he always the field man in your crew?

A. At all times.

Q. The duties of field man, as I understand it, on this particular job are to see to it that the couplings are made as you are coupling up the cars that are standing on these car repair tracks? That is one of his duties?

A. That is one of his duties.

126 Q. What are his other duties as the field man?

A. To bleed the cars when we go to work.

Q. Bleed the cars?

A. Let the air off of the cars.

Q. What do you mean by letting the air off the cars?

A. When these cars are placed on the repair tracks, they charge the car with air, to see whether or not the braking appliances are in operation. After they make the inspection they leave the air in the reservoirs, and when the air is left in the reservoir the brake is applied on the car and the only way you can move it is by reducing the air pressure with a bleed cock, which expels the air from the reservoir and releases the brake.

Q. The car repairmen work on these cars between what hours of the day?

A. 8 to 4:30.

Q. And your crew comes to work at 4 o'clock, is that correct?

A. That is correct.

Q. The car repairmen do not work on these cars after 4:30 in the afternoon?

A. Unless it is some special occasion.

Q. And at the time when you come to work, 4
127 o'clock in the afternoon, the cars are spaced along the five tracks in the various places at which they have been repaired, is that correct?

A. That is correct.

Q. Or where they are in the process of being repaired?

A. That is correct.

Q. And are the cars coupled together or are they standing individually at that time?

A. They are standing spaced individually.

Q. So that the car repairmen can pass one side or the other as they are making the repairs?

A. That is correct.

Q. And it is the job of your crew to switch out cars upon which the repairs had been completed and to take them either into the general classification yard or set them in the terminal yard for further use or further movement, is that correct?

A. That is correct.

Q. And, of course, if the cars which have been repaired are standing in on one of these tracks, 1, 2, 3, 4 or 5, and there are some cars between that and the switch upon which the repairs have not been completed, you
128 have to go in and couple up the whole string of cars and bring them all out in order to get the one upon which the repairs have been completed, don't you?

A. That is correct.

Q. And then after you set that car out, then you put the cars back in on the repair tracks on which the repairs have not yet been completed?

A. Not always back into the same track in which they were taken out of.

Q. But you set them back somewhere in the car repair yard?

A. Yes, sir.

Q. And as you are doing that work, do you have one or two of these tracks that you use for the purpose of accumulating the cars upon which the repairs had been completed?

A. That is right.

Q. That is what you were doing with Track 5 on this particular night?

A. Yes.

Q. And similarly on this particular night you were also accumulating the gondolas on which the repairs had been completed on Track 1, isn't that true?

A. Yes, sir.

129 Q. So that of the six cars in the car repair yard, you were setting repaired cars on Tracks 1 and 5, and the cars upon which repairs had not been completed were going back on Tracks 2, 3 and 4, is that correct?

Mr. Ryan: I don't understand the question. I would like to have it read again.

(The last question was read by the reporter.)

Mr. Hackbert: I meant of the six tracks, not six cars.

Mr. Ryan: You said cars.

Mr. Hackbert: I beg your pardon.

Read it again with the word "tracks" in it instead of "cars."

(The last question was read by the reporter, as follows:

"Q. So that of the six tracks in the car repair yard, you were setting repaired cars on Tracks 1 and 5, and the cars upon which repairs had not been completed were going back on Tracks 2, 3 and 4, is that correct?")

A. That is correct.

By Mr. Hackbert:

130 Q. What kind of cars were you putting into Track 5?

A. Miscellaneous cars, that is, hoppers.

Q. Freight cars?

A. Cars that were routed home, couldn't be loaded.

Q. And when you speak of a car that had been routed home, what do you mean by that?

A. Well, they are either restricted cars that they can't load, or a car that is in a state of disrepair to such an extent that they won't load it, and they repair it sufficiently to route it home for repairs.

Q. When you speak of "home," you mean back to the railroad which owns that particular car?

A. That is true.

Q. You spoke of the fact that these cars as they stand on the repair tracks have had the air brakes set. There are air brake connections spaced regularly all through this car repair yard where the air hose can be coupled up and the brakes applied right away, is that true?

A. That is true.

Q. When you come to work, when your crew comes to work at 4 o'clock in the afternoon, these cars are all spaced separate and apart from each other
131 throughout the car repair yard generally?

A. That is right.

Q. Mr. O'Donnell, these jurors, I take it, don't know much about railroad equipment. Can you describe a railroad coupler to the jury?

A. A railroad coupler is a long casting, I would say about 2½ feet long. At the end that is inserted into the car it is square. It is inserted into what they call the end sill and when it is placed and inserted in there, there is a large steel pin that goes in there and locks it into position, and there are a series of springs on each side of the coupler, this drawbar, so that when the car is moved the drawbar itself can be moved—it is not rigid—to take up the shock of moving the enormous tonnage that is contained in these cars.

Q. In other words, there is a movement forward and back?

A. That is right.

Q. Of the drawbar?

A. And there is a lateral movement when they go around curves, there is a lateral movement in order that the car makes these curves. If it were in a rigid

132 position it would have to break, so that the coupler moves over as you come into the curve, like this, on both cars, to allow for that curve in the track.

Inserted into this coupler, into the jaws of the coupler—it is shaped like this—and inserted into that jaw of that coupler is a lock, and then there is what we call a knuckle which is put into this jaw of the drawbar, and it is held fast by a large steel pin that goes down through a hole in the top of the jaw and at the space of the jaw, which permits the knuckle to work on this pin freely. That is, it can open and close.

When it closes, like that, and the coupling is made and this large steel lock—it is a square piece of steel—it drops down and holds the coupler closed so that when the pressure is put onto the lip of the knuckle you can move the car.

If the coupling is not made, it permits the knuckle of the drawbar to swing freely on this pin and open.

Q. How much play is there forward and back in the drawbar? I am not speaking of lateral play, but the forward and back play.

A. Well, I couldn't answer that. It varies in 133 various types of drawbars and cars.

Q. Well, it varies between what limits?

A. Oh, I would say ten inches, that is, in and out.

Q. Yes. Will that be 10 inches for each coupler at the place where the couplers are united, or 10 inches for the set of couplers?

A. This would be purely a guess.

Q. Let me put my question to you this way, Mr. O'Donnell. When you are shoving cars, that is what you described as having the cars bunched together, isn't it?

A. Yes.

Q. When you are stretching the cars out, or taking out the slack you are pulling the cars, that is what you call stretching the cars?

A. That is true.

Q. Now, how much shorter is the distance between the ends of the two cars when the cars are bunched together or being shoved, as compared with the distance when they are stretched or being pulled?

A. If you had the two cars together, I would say approximately ten inches.

Q. I wanted to know whether it was ten inches for the two cars together—

134 A. That is right.

Q. —or whether the 10 inches was the movement for one car.

A. (No response.)

Q. And the amount of lateral play from side to side in a drawbar, how much does that amount to in the knuckle end of the coupler?

A. Well, I would say on the 65-foot gons, which are the largest cars that we have in service, at the end—that is, where the knuckle is in the couple—I would say that it would have a lateral motion of at least 15 inches, that is, 7½ and 7½, this way, as you work. That is, at the extreme end of the coupler.

Q. That is right, and that is to permit the cars to pass around curves when they are coupled together?

A. Yes.

Q. As you were switching these cars in on these tracks this particular night, starting from east and working west, there was a curve, of course, at the point where Track No. 3 comes off the rip track lead?

A. That is correct.

Q. And then further up the track there is a curve at the point where No. 1 comes off the rip track lead?

A. Yes, sir.

135 Q. By the way, as this diagram shows, both tracks 1 and 2 come off the rip track lead at a single switch and they separate some distance east of the switch?

A. That is true.

Q. And then Tracks 3, 4, 5 and finally 6 each comes off the rip track lead separately?

A. Yes.

Q. And further west beyond the rip track lead there is another curve, this time in the opposite direction, where the rip track lead comes off of 27 lead?

A. Yes, sir.

Mr. Ryan: Your Honor, may the record show that counsel is demonstrating with Plaintiff's Exhibit 1 in asking questions?

The Court: The record may so show.

By Mr. Hackbert:

Q. Now, 27 lead is the set of tracks which is shown at the bottom of Plaintiff's Exhibit 1, the track here, isn't it?

A. Yes, sir.

Q. And the track immediately north of that is the terminal lead?

A. Yes, sir.

136 Q. And the terminal lead leads on down here beyond the right-hand edge of this exhibit into what is known as the terminal yard, is that correct?

A. Yes, sir.

Q. That is where the roundhouse and the cinder pit and coal chutes are?

A. Yes, sir.

Q. 27 lead goes on down around those and comes up ultimately around the east side of the roundhouse?

A. Yes, sir.

Q. And down in that area is what you referred to yesterday as the gate?

A. Yes, sir.

Q. In other words, the east gate is the east entrance into the Kirk Yard?

A. Yes, sir.

Q. And immediately north of the terminal lead is the rip track lead off which the car repair yard tracks branch?

A. Yes, sir.

Q. When two cars are being coupled together, if both knuckles are closed, the coupling will not make, is that right?

A. That is right.

137 Q. If one of the knuckles is open in normal operation the coupling will make?

A. If it is on center and if it is in repair it will make.

Q. So that there are two factors which will influence whether or not the coupling will make. One is whether or not both knuckles are open, and the other is the question of the respective alignment of the two drawbars, in other words, whether they are opposite each other?

Mr. Ryan: I object to the assumption in the question that two knuckles have to be open. The witness said otherwise, that one knuckle is sufficient.

The Court: Sustained. Reframe the question.

Mr. Hackbert: I beg your pardon.

Q. There are two factors then that determine whether or not a coupling will make. One is whether or not at least one of the knuckles is open, and the other is whether or not the drawbars are lined up opposite to each other, is that correct?

A. There is another factor. If it is in repair.

Q. If it is in repair, and those are the three factors that determine whether or not a coupling will make?

138 A. Yes, sir.

Q. And the work of your brother, a part of his work that night in this crew as you were switching out the cars standing on these tracks in the car repair yard, was to make certain that the knuckles were open and the drawbars were in alignment so that when you came in on those tracks that the various couplings would make?

A. That is correct.

Q. You began your work this particular night down at the east end?

A. Yes, sir.

Q. Of the car repair yard, didn't you?

A. Yes, sir.

Q. And about how long was your crew working down at that end of the yard?

A. Oh, I would say about ten minutes until six before we finished up at the east end.

Q. Did you come to the west end right then, or did you stop for supper?

A. We come around to the west end.

Q. When you were working at the east end, had your begun at that end to make up the two cuts of cars on Tracks 1 and 5?

139 A. Yes, sir.

Q. You had shoved cars in from the east end onto both of those tracks?

A. That is correct.

Q. And, I take it that the start of your switching operations down there had involved pulling some cars off of those two tracks to make room to build up these other cars?

A. Yes.

Q. The work which your brother was doing required him to work considerably in advance of the rest of the crew, didn't it?

A. Yes, sir.

Q. That is, he would be out of your sight for an hour or more at a time, perhaps, in the course of his work?

A. He would from 4 until 4:30 or 4:45, when he would come into the office.

Q. In other words, he would start out ahead of your movements and line up these couplers before you ever came in on those tracks, is that right?

A. With my assistance. I assisted him in opening the couplings and bleeding the cars.

Q. Both of you went along and did that work in

140 getting the cars in condition to be switched out?

A. That is correct.

Q. And he did that work pursuant to your direction? A. Yes.

Q. You would tell him what tracks you would switch in on and what cars were to be taken out, is that right?

A. Yes.

Q. And you would also tell him what you were going to do with those cars after you had switched them out?

A. Yes.

Q. You got all your orders in written form from the yardmaster or someone in the yardmaster's office?

A. I got them in the car shop. The car shop foreman gave me a copy of the switch list.

Q. Did the switch list which you were given that particular night show the movements of the cars which you were to put in on Track 5?

A. Yes, it would show them.

Q. And how many cars altogether were you to put in, into Track 5, and take to Kirk Yard?

A. Well, I don't have an accurate count. I never did have one.

Q. Do you still have that switch list?

141 A. My list showed 51 and 2, would be about 53 cars.

Q. About 53 cars on your list that you were to collect on Track 5 and take to Kirk Yard?

A. I would like to count this over. My figures show 51 and 40, and that indicates gons and miscellaneous cars.

I am of the opinion that the first figure is the miscellaneous cars. However, I could just check through on the other.

Q. Would you just check through and let us have the number of cars which were to go on Track 5?

A. It shows 40 cars.

Q. Forty cars were to go in on Track 5?

A. That is right.

Q. And 51 cars were to go in on Track 1?

A. That is true.

Q. Track 1 is a longer track than Track 5, extends farther out to the west?

A. That is right.

Now, this Track 5, we get the cars off the coal chute and put into 5, that goes out with miscellaneous, and I do not recall whether or not I had switched that coal chute that evening or not.

Q. Does the switch list which you have indicate 142 whether or not you had instructions to switch the coal chute that night?

A. No, we do that without being instructed. If the coal chute is full of empties, it is my duty to reach down there and set them over with any miscellaneous cars and send them out.

Q. And by sending them out, you mean take them to Kirk Yard?

A. Take them around down into the train yard.

Q. This list of 40 cars you were to put in on Track 5 are the six cars that you set in there that you described in your direct testimony yesterday, are those six cars included in the total of 40 cars?

A. Yes, they are.

Q. And the home route car which you switched into track 5 is also one of those 40 cars, isn't it? A. Yes, sir.

Q. And the car on which the coupling broke which went into that track was the forty-first car then in that cut?

A. I wouldn't say it was the forty-first. I am not sure. I already stated I may have set two cars in from the coal chute. I may have picked up six or eight in the coal chute and shoved them into 5.

143 Q. But aside from any of the cars from the coal chute, that car with the broken coupler was the forty-first car from the repair tracks which you and your crew set in on the track that night?

A. It would be the 41st or 42d car, something like that.

Q. Of course, you carry out the instructions on your switch list, you don't put any cars off the car repair track into that cut to go into the train yard except the ones you are directed to take, isn't that true?

A. That is true.

Q. So that if your switch list shows 40 cars, why, 40 cars are all of the cars you would take off of the repair tracks?

A. But the switch list is not always correct.

Q. How about the switch list you have there for that particular night? Is that switch list correct to the best of your knowledge?

A. Substantially.

Q. Before you shoved Track No. 5, you had made some other moves in the west end of the yards this particular night, hadn't you?

A. Yes, sir, I had switched at the west end.

Q. So after you finished your switching at the east
144 end you came down to the west end and you did

some more switching at the west end, and after you had done that switching, you told us yesterday on your direct examination that you shoved Track 5. Where was your engine at the time you made that movement, at which end of Track 5?

A. The west end of Track 5.

Q. And how far in on Track 5 did your engine travel in making that particular shoving movement?

A. Well, when I come out of there, I had about six car lengths of room in there.

Q. I think yesterday you told us seven car lengths.

A. Well, there might have been seven. I don't know just accurately. I am just estimating.

Q. Six or seven car lengths between the westerly end of that cut and what other place, is what I am trying to get at? You have cars on Track 5. Did you have six or seven car lengths between the westerly end of that cut and the switch points of No. 5 switch or the switch points of No. 4 switch?

A. In the clear on No. 5 there.

Q. In other words, you had space for six or seven cars between switch No. 5 and the westerly end of the cut?

145 A. That is it.

Q. And when you say in the clear, you mean far enough in on Track No. 5 so that you could look up and down the last track lead without colliding with the cars that were standing on Track 5?

A. That is correct.

Q. They were all in the clear?

A. That is right.

Q. How much space is there between the switch points of No. 5 switch and the switch points of No. 4 switch, how many cars or car lengths?

A. Between five and four switch?

Q. Between 5 and 4?

A. Between 5 and 4 switch, oh, about three and a half or four car lengths. Now, remember these cars vary in length. We have 40-foot cars, we have 48-foot cars, we have 65-foot cars, and certain—

Q. What kind of cars were you handling that night?

A. I handled various lengths of cars all evening.

Q. After you had shoved Track 5 and left this six or seven carlengths space on Track No. 5, then you put six cars in there in—a total of six cars—in four different movements, is that right?

A. That is my recollection of it.

146 Q. You got three cars off Track No. 4 and three cars off Track No. 3?

A. I think those are the tracks I got them off of.

Q. Now, as those movements were made, where were you?

A. I was standing upon the lead up at the north of the tracks and as they are set out in that exhibit.

Q. Standing up alonge the rip track lead?

A. Opposite No. 1 switch up there.

Q. Opposite No. 1 switch in the rip track lead?

A. Yes, sir.

Q. And as those movements were being made, where was your brother, if you know?

A. He was on the south side of the lead.

Q. On the south side of the rip track lead?

A. Yes, sir.

Q. And was he the one who would uncouple the cars as you pushed them down toward Track 5?

A. No, sir.

Q. Who did the uncoupling?

A. The head man.

Q. That is, Novicki?

A. Yes, sir.

Q. And what, if any, duties did your brother 147 have in connection with those four movements into Track 5?

A. He would line the switches for me, see the switches are on the opposite side on which I am working.

Q. You are working on the—

A. North side.

Q. North side?

A. And he is standing on the south side.

Q. In other words, as you take these cars off Track No. 4, he had to line No. 4 switch so that you can pull out onto the rip track lead?

A. That is right.

Q. Then he throws the switch and he lines that track so that you can push those cars down the rip track lead toward Track 5?

A. I would kick them down to 5.

Q. And that is what you were doing that night, and Novicki was the one who would uncouple the cars?

A. Yes, sir.

148 Q. And you would haul the rest of it back and put it into 2, 3 or 4, as the case might be?

A. That is true.

Q. As I understand, after you had kicked those six cars in the direction of track No. 5, were there any of those cars that came to rest on the rip track lead between No. 4 switch and No. 5 switch?

A. Repeat the question, please.

(The last question was read by the reporter.)

By the Witness:

A. Yes.

By Mr. Hackbert:

Q. How many cars were standing on the rip track lead between No. 4 switch and No. 5 switch?

A. The west car was out foul about—it completely fouled the lead. It was on the lead.

Q. It was on the lead. Now, do I understand, so as to foul the rip track lead at No. 5 switch?

A. It was out over 5 switch in a westerly direction.

Q. Out over No. 5 switch in a westerly direction?

A. Yes.

Q. How far was the west—how far was it west of 149 the switch points of No. 5 switch?

A. Oh, I would say maybe a car length or a car length and a half.

Q. And do I understand you correctly that there were three cars there that were coupled together?

A. There were three cars standing there.

Q. Three cars standing there?

Mr. Ryan: Just a moment. May we have the question answered? The witness did not answer the question.

The Court: Did you have anything further to say, or had you finished?

Mr. Ryan: The question was, if three cars were coupled together—and I don't think—I am not sure the question was answered.

The Court: He answered that.

Mr. Ryan: I would like to have the answer read.

(The last answer was read by the reporter.)

Mr. Ryan: I submit that that is not an answer to the question.

The Court: You may answer, as to whether or not they were coupled.

The Witness: The cars were coupled that were standing there. That is, they were bunched together.

150 By Mr. Hackbert:

Q. Those three cars were bunched together?

A. That is right.

Q. Then there was a space of about a car length, is that right?

A. That is right.

Q. Then there was a car standing alone?

A. That is right.

Q. And the easterly end of that car was about opposite this stop sign in the center of track 5?

A. The easterly end of that single car that was standing there? No.

Q. Maybe I misunderstood your testimony earlier this morning. Was there a car at that time which was standing near the stop sign in the middle of track No. 5?

A. Yes, there was.

Q. All right. Of the six cars that you had put in on track No. 5 after you had shoved that track, starting at the west end counting toward the east, which car was it whose easterly end was at or near that stop sign?

A. The east of the three cars that I just mentioned.

Q. I see. In other words, the three cars which

151 started out here on the rip track lead —

A. Yes.

Q. —some distance beyond the switch points of No. 5 switch, those three cars extended from that point across No. 5 switch into track 5, and the easterly end of that third car was opposite the stop sign?

A. Right approximately at the stop sign.

Q. There was an approximate space of a car length from there east, and there was another car standing there alone?

A. I am not sure, at the other end. There was a space of approximately a car length. I didn't go down there. I couldn't tell. I am just looking down from No. 1 down there.

Q. You were up at No. 1 switch and looking down at the north side?

A. Yes, sir, and I have to calculate this distance. I can't say with any degree of accuracy.

Q. After you put those six cars in track 5 you then went back into track No. 2, is that right?

A. Yes, sir.

Q. And you began to haul the cars that were standing on track No. 2 out past the switch where No. 1 152 and 2 branch off from each other, and over the No. 1 switch, or rip track lead, and out onto No. 27 lead, is that right?

A. That is right.

Q. And it was at the time that you were making that movement that you had your last conversation with your brother?

A. As the cars were pulling, but I was in conversation with my brother.

Q. And had the cars pulled all the way off track 2 at the time that you had that conversation or were they just in the process of moving out of 2?

A. He was talking to me until they clear the No. 1 switch.

Q. And where were you and he standing at the time you had this conversation?

A. In the vicinity of 1 there at the west end.

Q. In other words, up in this area?

A. That is correct.

Mr. Ryan: Counsel is indicating the point.

By Mr. Hackbert:

Q. Right at this point, Mr. O'Donnell, is the letter A that was put on there yesterday for some descrip-
153 tive purpose. You were standing up in the vicinity of the point that is marked A on this chart, or blue print?

A. Yes, sir, I was.

Q. And you told him at that time that you had one car to put into track No. 5?

A. That is correct.

Q. And the rest of the cars, the balance of the cars were to go to No. 1 and some set backs to No. 2?

A. I had one for the terminal lead.

Q. I mean so far as your conversation with him was concerned.

A. Yes, I didn't give him all the facts.

Q. But you did tell him you were going to set the balance of the cars in on No. 1 and the setbacks in on No. 2?

A. That is right.

Q. And after you had that conversation then he started down, walking along the rip track lead to track No. 5, is that right?

A. Yes.

Q. Walking along the north side of the track?

A. That is correct.

Q. And you stayed up there at No. 1 switch?

154 A. Yes, sir, I did.

Q. And after the cut of cars had cleared No. 1 switch, then you began to back that cut down along the rip track lead down toward track No. 5?

A. Yes, sir.

Q. And as that movement was being made Novicki was walking in a westerly direction up along No. 27 lead in the direction of the engine?

A. Yes, sir.

Q. And it was his duty, as the head man, to pass your signals back to the engineer?

A. Yes, sir.

Q. From the place where you were standing near

No. 1 switch that night could you see the engine, could you see the engineer see—could the engineer see your lantern?

A. I could see the smoke of the engine, and the engine going up 27 between the poles that are alongside of the track.

Q. These poles are on the north side of No. 27 lead?

A. Yes, sir, they are.

Mr. Hackbert: Mark this Defendant's Exhibit 2 for identification.

155 (Said document was marked Defendant's Exhibit 2 for identification.)

By Mr. Hackbert:

Q. Mr. O'Donnell, I show you what has been marked Defendant's Exhibit 2 for identification, and this line of what I would call telegraph poles in the center of that picture, are the poles you are referring to, are they not?

A. This center line of poles right here.

Q. And did you give the signal that started the movement of that cut of cars back toward the rip track lead?

A. Yes, I did.

Q. How many cars were there in that cut as you remember it now?

A. Around 24 cars.

Q. Do you have a list of those cars in the switch list which you have?

A. Yes, I have.

Q. Could you look at it and just refresh your recollection as to the number of cars that were in that cut?

A. There were 24 coming off of 2, and I put a dump car in there off of 1. I don't recall of putting
156 any more in there than I hauled out. There were 24 coming out of there. There is a possibility I might have hauled one or two out in there. I don't recall.

Q. You started to shove that cut of cars down the rip track lead with the intention of putting this car on the easterly end of that cut into track No. 5, is that correct?

A. Toward track 5.

Q. Toward track 5?

A. Yes.

Q. The track with the cars on it down there standing on the rip track lead and following the 5 switch, the closest you could get that car to track 5 would be to set it on the rip track lead somewhere between 4 and 5 switches?

A. That is correct, without hitting those cars.

Q. Without hitting those cars. As that movement was being made, where were you, still back at No. 1 switch?

A. No, I changed my position as the movement was in progress.

Q. How did you change your position as the movement went along?

157 A. I kept backing out into the field there, off of the lead. I got out there in the weeds.

Q. By that do you mean that you went in a northwesterly direction or a northerly direction from No. 1 switch?

A. Northwesterly direction.

Q. Northwesterly direction from the point marked A on the blue print?

A. That is correct.

Q. Novicki all the time was somewhere north and west of you between you and the engine?

A. That is right.

Q. Where was the easterly end of this cut when you gave the first stop signal?

A. He was up on No. 27, up there, about the 27 switch.

Q. When you speak of 27 switch, you mean the switch right up in that vicinity, right where—

A. Yes, right up in that vicinity, right where you are pointing there.

Mr. Hackbert: Suppose we mark that with a letter B.

(Mr. Hackbert then marked Plaintiff's Exhibit 1 accordingly.)

By Mr. Hackbert:

158 Q. That is the switch where the rip track lead and the terminal lead come off 27 lead?

A. That is right.

Q. Now, you intended to put that car, to stop that car down here between tracks 4 and 5 on the rip track lead, didn't you?

A. No, I didn't.

Q. Where did you intend to stop that car?

A. To clear No. 1 there.

Q. Just—

A. Right there.

Q. Put it past No. 1 switch and on the rip track lead?

A. That was my intention.

Q. And you gave the stop signal, you started to give the stop signal when that car was opposite the point marked B?

A. The stop signal? What stop signal?

Q. The first stop signal that you gave.

A. As he pulled out of No.—

Q. No, as he pulled back toward the rip track.

Mr. Ryan: You mean pushed.

Mr. Hackbert: Pushed.

The Witness: The first signal I gave him was
159 the back up signal.

By Mr. Hackbert:

Q. Where was the cut of cars at that time?

A. Right where your thumb is.

Q. At point B?

A. That is correct.

Q. You misunderstood my earlier question. Where was that car when you gave the first stop signal in the course of that movement back toward tramk No. 5?

A. When the cars stopped on No. 27 I gave a sign to back up, to bring the cars back.

Q. In response to that signal the cars started to move back toward the east?

A. Not immediately. Finally he started to come back with the cars. When the first car—the eastwardly car

of that cut—started in off of the lead at No. 1 switch I started swinging him down before the car was in the clear.

Q. Before the car was in the clear of No. 1 switch?

A. That is true.

Q. Some of these cars that your engine had a hold of were going into track 2 and some of them were going into track 1, is that right?

160 A. 5, 1, 2. Yes, that is correct.

Q. You wanted to get this car past No. 1 switch?

A. That is true.

Q. Now, as you were passing the signals to Novicki there was some smoke blowing across No. 27 lead somewhere between you and the engineer?

A. That is true.

Q. Whose duty was it to cut that first car off of the other cars in the cut?

A. Whose duty was it to cut the car off?

Q. Yes.

A. It was the head man's, if I told him to cut it off.

Q. The head man was Novicki?

A. That is right.

Q. And he was back somewhere between you and the engine?

A. That is true.

Q. How far had that first car gone down the rip track lead when you saw that your signal to stop was being obeyed and the cut of cars was coming to a stop?

A. How far were the cars in on the lead?

Q. Yes.

161 A. They were pretty close to impact when he stopped.

Q. In other words, they had almost come down as far as— to a point between switch No. 4 and switch No. 5?

A. That is correct.

Q. And it was at that point that the coupler broke?

A. That is right.

Q. You say that the engineer made a violent stop?

A. He did. He stopped violently, in answer to my washout.

Q. Mr. O'Donnell, you remember that on January 14, 1946, four or five days after this accident, you gave a statement to Mr. Cogswell, the Division Claim Agent?

A. That is right.

Q. You have known Mr. Cogswell for a long time?

A. I knew him.

Mr. Hackbert: Will you mark this page Defendant's Exhibit 3—rather, mark these Defendant's Exhibits 3-A, 3-B and 3-C for identification.

(Said sheets were accordingly marked, respectively, Defendant's Exhibits 3-A, 3-B and 3-C for
162 identification, as directed.)

By Mr. Hackbert:

Q. Mr. O'Donnell, I hand you a document consisting of three sheets, which have been marked, respectively, Defendant's Exhibits 3-A, 3-B and 3-C for identification, and I will ask you if that is the statement which you gave to Mr. Cogswell on January 14, 1946, without reading it all over?

A. I will have to read it over.

The Court: We will take the morning recess at this time. We will recess for ten minutes.

(Recess taken.)

The Court: You may proceed.

Mr. Hackbert: Would you read the last question and answer, please?

The Court: He said he had to read the statement.

Mr. Hackbert: I wanted to get the phraseology of my question.

(The last question and answer were read by the reporter.)

By Mr. Hackbert:

Q. Mr. O'Donnell, after having read these three sheets of paper during the recess, I will repeat my question.
163 Is this the statement which you gave to Mr. Cogswell?

A. It is.

Q. And I notice in here you are referred to as John O'Donnell. I think you have been identified here in the trial so far as Jack O'Donnell. You are known as Jack O'Donnell and your actual given name is John, is that correct?

A. That is correct.

Q. And on the third page of this statement, the signature "John O'Donnell" is your signature?

A. It is.

Q. And on the bottom of the first two sheets, Exhibits 3-A and 3-B, the initials "J O D" were written by you?

A. That is correct.

Q. And in Defendant's Exhibit 3-A I call your attention to this statement:

"As the cars came toward the lead, I started to give a stop sign, and this sign was passed to the engineer, and about the time the stop was made I was just opposite the switch leading into the west rip lead from 27, and the east end of the cut I had ahold of was just about between Tracks 3 and 4."

164 Without completing that sentence, just to go that far, that appears on Exhibit 3-A, does it not?

A. Where is this at?

Q. There.

A. That is correct.

Q. And then the statement continues:

"As it made the lead, two cars broke off and continued down against the cars which were then standing in the clear of No. 4 switch"?

Mr. Ryan: If your Honor please, I do not like to interpose unnecessary objections, but I do not see the relevancy of this questioning. It does not tend to impeach anything he has testified to, if your Honor please.

The Court: I agree with you as to the last statement; as to the first you read, there might be some impeachment with reference to the signal having been received, but this last you read, I agree with Mr. Ryan.

Mr. Hackbert: I do not think it is impeaching. It just connects up.

The Court: Are you using it for the purpose of
165 refreshing his recollection?

Mr. Hackbert: No, I am just using it for the purpose of completing the previous statement and showing that it was at that point that the couplers broke.

I think there is some slight impeachment. He testifies now the couplers broke when this car was almost down to No. 5 switch. In the statement, as I read it, he says the coupler broke when the cars were just in the clear of No. 4 switch.

Mr. Ryan: The witness did not say they were almost down to No. 5 switch. He said they were in proximity to the end car standing near No. 5 switch.

A. Yes.

Q. It is true, before you had signed this statement,

The Court: That is what I recall his testimony is. The objection is sustained to the last question.

By Mr. Hackbert:

Q. Mr. O'Donnell, I call your attention, on the second page—no, the last sentence of the first page:

"The engineer was using good judgment in connection with the lack of view of signals, and was very cautious in making the moves."

Mr. Ryan: May I have that read? I didn't hear one word you said there. I wasn't listening carefully.

The Court: You may read it.

166 (The last question was read by the reporter.)

The Court: Go ahead.

By Mr. Hackbert:

Q. That statement appears on page 3 of this exhibit.

A. I didn't say that he was not cautious.

Q. Well, Mr. O'Donnell, my question is, that is the statement which appears on Defendant's Exhibit 3-C for identification that I have just read to you?

A. That is right.

Q. And also just above your signature, Mr. O'Donnell, appears this sentence:

"Have you read the above statement of three pages and is it true and correct?

That is followed by the word, written in pencil, "Yes," and the letters "J O D." The word "yes" and the

initials, "J O D" are in your handwriting, is that correct?

A. Yes.

Q. It is true, before you had signed this statement, you read it, is it not?

A. Yes.

Q. Following that is this:

167 "Does it contain all the facts you have knowledge of concerning this accident?"

And there again is written the word "Yes," and the letters, "J O D." That handwriting is in your handwriting?

A. That is true.

Q. During the recess period, you read this entire statement, didn't you?

A. I did.

Q. There is not anything in this statement, is there, Mr. O'Donnell, about the engineer not obeying your stop signal or about your giving a wash-out signal?

A. Well—

Q. Look at the statement again.

A. Yes, there is mention of him not seeing my signals.

Q. Will you read what language there is to that effect?

A. "After this cut was nearly on, the engineer slowed down practically and stopped. That is, as we were pulling out of No. 2, and I looked toward the west then and saw quite a bit of smoke blowing across the track and I thought he couldn't see my signals."

Q. No, but, Mr. O'Donnell, I am talking about, as this movement comes back toward the east and you were standing at No. 1 switch and you then gave a stop

168 signal to Novicki to be transmitted to the engineer, and you said in your examination here yesterday and again on your examination here this morning that that stop signal was not obeyed; is there anything in those three pages which I have handed you, Defendant's Exhibits 3-A, 3-B and 3-C, about the engineer not obeying your signal which you gave at that time as the movement was coming back toward the east?

A. No, there is nothing in this statement.

Q. Anything in this statement about your giving a wash-out signal to stop the movement after the cars had passed No. 1 switch and were down in the neighborhood of either 3, 4 or 5 switches?

A. No, there is nothing in there.

Q. And this statement was made on January 14, 1946, five days after the accident, was it not?

A. That is true.

Mr. Ryan: May I see it?

Mr. Hackbert: When I offer it.

Mr. Ryan: I would like permission to see the statement, so I may not waste time.

The Court: Yes. Over the noon recess you may look at it. I assume, of course, if he finishes his cross examination before then that I will recess so that
169 you may read it.

Mr. Ryan: Counsel said he will give it to me when he offers it. I think I am entitled to it now.

The Court: I have just ruled that you may have it.

By Mr. Hackbert:

Q. After the two cars broke away from the cut and coupled into the three other cars standing there, that moved the three cars down onto Track 5, and when the cars came to a stop the westerly car, the one on which the couple had broken, was standing about in the same place as the most westerly of the three cars had been standing previously?

Mr. Ryan: I object to that, if your Honor please, assuming something that I did not understand the witness to ever testify to.

Mr. Hackbert: I think I am entitled to cross examine.

Mr. Ryan: You have no right to assume a fact in the question.

If your Honor please, he can ask him if that is a fact but he cannot assume that it is the fact.

The Court: Objection is sustained.

By Mr. Hackbert:

Q. Did the car with the broken coupler come to
170 a stop approximately at the same place as the most westerly of the three cars had previously been standing?

A. It was between 4 and 5 switch.

Q. And was that about the same place that the other car had been standing?

A. In the vicinity.

Q. So that it had moved, it had struck those three cars with sufficient force to move the three cars a distance of about two car lengths?

A. I wouldn't say two car lengths.

Q. About how far did they move?

A. Approximately a car or a little better.

Q. Where were you at the time the cars stopped?

A. I was up on the north side of the tracks there at No. 1 switch.

Q. Did you go down to that area where those cars had moved into at that time?

A. No, I didn't.

Q. Where did you go after that?

A. I pulled the cars right out.

Q. In other words, you gave the back-up signal and the cars were pulled back up out toward the west?

A. I gave the "proceed" signal, "go ahead," and pulled it out in a westerly direction.

171 Q. The engine was headed in another direction and the proceed signal would cause him to move toward the north and west?

A. Yes, sir.

Q. Did you bring those cars to a stop near where you were standing?

A. I stopped—

Q. And that is when you looked over the car which was on the east end of that cut?

A. I examiner the coupler.

Q. And there was nothing to be observed about that coupling?

A Not a thing.

Q. Where did you go after that?

A. I stepped over so I could look down 5.

Q. And by saying you stepped over, what do you mean, you stepped over where?

A. I would have to step over, because there was a car standing clear on No. 3 there that I couldn't see down the lead, the inside of the lead is five curves in. I stepped over so I could look down the track 5.

Q. But you did not go down there?

A. No, I didn't.

172 Q. You knew your brother was somewhere down in that vicinity or at least he had gone down Track 5 at the time you were moving this cut of cars out of Track No. 2?

A. Yes.

Q. But there was nothing about that incident as it happened there that aroused any suspicion in your mind that anything might have happened to him in the course of the movement which had just been made at that time?

A. That is true.

Q. After you had brought those cars back toward the northwest, state what the next movement was that your crew made.

A. I distributed them in the various tracks in which they were to go.

Q. Put some of the cars in on Track 1 and some of them on track 2, is that right?

A. That is right.

Q. Then I think there was one car you brought down the terminal lead and put in the terminal yard?

A. Yes.

Q. That was one of the last movements which you made with that cut of cars, is that right?

A. Yes, sir. I shoved down the terminal lead and
173 I think I put two cars in the terminal—

Mr. Ryan: Will you keep your hand down so that I can hear everything you say, please?

By Mr. Hackbert:

Q. You shoved two cars down into the terminal?

A. Yes.

Q. Then it was after you made that movement you went back and shoved Track No. 1?

A. No, I came back up the terminal lead and I stopped there. I had the ash car next to the engine.

Q. And you set the ash car in on the rip track lead in the vicinity of Track 5?

A. Yes, I set it down, as I remember, I pulled up on the lead, and pulled the pin, cut the car away, and I told Johnnie to let the car drift into 5, and I stood there with a block to block it so it wouldn't run back in a westerly direction.

Q. In other words, you stood somewhere between 4 and 5 switch to block the car?

A. Right inside the lead, I was.

Q. By right inside the lead, you mean inside the No. 4 switch or the 5 switch?

A. The 3 switch.

Q. The No. 3 switch?

174 A. Yes, sir. That is just inside the lead.

Q. When did you walk along Track No. 5?

A. Before going to the terminal yard.

Q. If I understood you correctly, after these cars went down in the direction of Track No. 5 and you pulled the rest of the cut back out here to No. 1 switch, you put some of the cars back in Track 1 and some on Track 2, is that right?

A. Yes.

Q. And then you make this move down into the terminal yard?

A. No, sir.

Q. After you switched the cars in on 1 and 2, perhaps I had better let you tell it.

A. I was completely full of cars. I didn't have room for any more in No. 1. I had ahold of 4 cars—this dump car, which is referred to as the ash car, was next to the engine; so I shoved down to No. 5 with these cars, intending if possible to tie them onto No. 5. I didn't have room on No. 1 for the cars. No. 1 was filled to capacity. When I got down to No. 5 I examined the coupler and it was broken.

Q. That is, the coupler on the west end of the westerly car that was standing?

175 A. Yes, sir.

Q. While we are on that, that was a clean break across the entire coupler, is that right?

A. The knuckle.

Q. The knuckle?

A. At the point where the pin is inserted to hold the knuckle in place, there was a break.

Q. Completely across it?

A. Yes.

Q. A fresh break?

A. Well, I examined the coupler and there was evidence of a partial fracture on the inside of the coupler.

Q. Were you able to find the other piece of the coupler?

A. No, it was in the center of the track there. I didn't find it.

Q. You didn't pay any attention to that?

A. No, sir.

Q. After you examined this coupler, what did you do?

A. I proceeded to take the pin out and I noticed the cotter-key at the base of the pin which was holding it into the slot. I reached over and picked up a bolt 176 off of the ground and tried to tap it out when the head man came up and attempted to assist me to get the pin out.

Q. And you weren't able to get it out?

A. I wasn't able to get it out.

Q. Then what did you do?

A. I told Johnnie that Bill had mentioned the fact that there were couplings in 5 and I said, "I don't see him here. He must have walked up to the east end but," I said, "I will make sure. I will examine these couplers and see whether these joints are made."

I said, "You pull the cars out and shove down the terminal lead and I will walk up 5 and I will examine the couplers. I will cross over to the terminal yard and shove the cars, one or two cars into 2 terminal," but I proceeded down No. 5, the north side of No. 5, examining the couplers at the west end of the track.

Q. And how far down Track 5 did you go?

A. I would say approximately ten cars.

Q. And were those couplings all made?

A. They were all made.

Q. And that is true of all of the cars from the car with the broken coupler on the west down as far
177 as you walked?

A. That is true.

Q. How did you get through then to come down here to the south of the terminal lead?

A. I cut right through 5, went through the cars, climbed through the cars over 5, 6 and through 7 to No. 2 terminal.

Q. In other words, you climbed over between the cars to the coupler?

A. Yes, I climbed through the center of the cars, that is, between the cars.

Q. As you walked along, you flashed your lantern on each coupling?

A. I examined the couplings as I went along.

Q. You walked along the side of the cars as you went there for the entire ten car lengths?

A. Not exactly alongside of them, but I walked next to them. I walked, you know, right alongside the track.

Q. And you were carrying the switchman's lantern?

A. That is true, I was.

Q. Shining onto this part of the yard is a floodlight which is located on the top of the coal chute down in the terminal yard, isn't that true?

178 A. That is true.

Q. And that floodlight is focused up along these leads that we have been talking about in the testimony here?

A. It is focused in a northwesterly direction over the rip track.

Q. Over the rip track, and that floodlight was on that night?

A. It was.

Q. Then after you made this move into the terminal yard, you came back up and you had shoved this dump car or ash car in on the rip track lead, then you shoved track No. 1 from the west toward the east, is that right?

A. No.

Q. In which direction did you shove No. 1 track?

A. The purpose of setting the dump car onto the lead track—

Q. No.

Mr. Ryan: Please answer his question.

By Mr. Hackbert:

Q. Not about the dump car.

A. I couldn't. I had to leave the cars hang out. I couldn't shove the track.

179 Q. Well, these four cars for Track No. 1 that you had ahold of at the time you went down to Track No. 5 and looked over the broken coupler, what did you do with those four cars?

A. I shoved them down into the terminal yard and brought them back with me and put them in No. 1 after I got rid of the ash car.

Q. After you got rid of the ash car, the four cars were the only cars you had ahold of, is that right?

A. It was four or five.

Q. And you shoved those cars in on Track 1?

A. I coupled them onto 1.

Q. How far to the west did the cars extend?

A. They fouled the rip track lead.

Q. And you pushed them in as far as they would go, is that right?

A. I just tied them on and let them hang out.

Q. And that was the last move that you made?

A. That is right, with the ash car next to the engine, and took it down and put it on No. 2.

Q. Were those the only cars in the cut of 24 or 25, out of Track 2, that you pushed back to No. 1?

A. No, there were other cars that went into 1.

Q. In other words, after the time these two cars
180 broke loose from the cut, you went back and made switching movements into track No. 1?

A. Yes.

Q. Finally, you filled Track 1 up to capacity or almost capacity?

A. Yes, sir.

Q. And you were pushing those cars in and coupling them together all the way down 1, is that right?

A. That is true.

Q. And the last move you made of the series of moves that night was to put these four or five cars in on Track No. 1, as far as they would go?

A. Yes, sir.

Q. And those cars which you had accumulated in that fashion on Track No. 1 were all cars on which the repairs had been completed?

A. Yes, sir.

Q. That was this cut with some 51 cars that we spoke about earlier this morning?

A. Yes, sir.

Q. When you had put those cars in on Track No. 1, your crew had completed those cars, so far as those cars were concerned?

A. Yes.

181 Q. You did not cut those into the terminal yard?

A. No, sir.

Q. The only cars you moved out of the car repair yard at the end of your work that night was the cut of cars that had been standing on Track 5?

A. Yes, sir.

Q. And after you had pushed these four or five cars in on Track 1, then you went out of the 27 lead and around the roundhouse?

A. Yes, sir.

Q. And you coupled onto the cars at the east end of No. 5? A. Yes, sir.

Q. Did you ride on the engine as it went around there or did you walk over? A. I rode around.

Q. You rode on the engine? A. Yes.

Q. Did Novicki ride on the engine? A. Yes.

Q. Novicki went where? A. To the east gate.

Q. He rode on the engine as far as the east gate?

A. That is right.

182 Q. And his job there at the east gate was to line the switches for your movement back through the east gate and into the general train yard? A. Yes.

Q. And you stayed with the engine and made sure that all the couplings were made at the east end? A. Yes.

Q. And I think there was one coupling to be made?

A. Yes.

Q. And you made that coupling? A. Yes, sir.

Q. And the engine started to pull that string of cars off Track 5 to go around the roundhouse and back down to the train yard? A. Yes.

Q. You didn't go along with that movement?

A. No, sir, I didn't.

Q. That was the time when you went over to the yardmaster's office? A. Yes, sir.

Q. As I understand it, in the work of your crew there, that it was true that the crew would not always all of them come around on the engine on this trip down the 27 lead and around the roundhouse? A. That is true.

183 Q. And that was particularly true in the case of your brother, whose duties normally did not involve his being with the rest of the members of the crew when you got all through with your movements at the west end? A. That is true, when we came around with the light engine.

Q. And it was a common practice for him, after he had finished up his work of lining up the couplers, to walk down the tracks to the switchman's shanty?

A. No, that wasn't common practice to do that.

Q. How did he walk—how did he ordinarily get from the west end of the yard at the conclusion of your night's work back to the switchman's shanty? A. It all depends on the nature of the work we had to do.

Q. What were the various ways he could go?

A. He can walk up to the east end, and I would usually meet him up there when we were making that pull.

Q. Sometimes he would go directly to the switchmen's shanty? A. Sometimes he would ride around with

184 me on the engine.

Q. Sometimes also he would ride out on the cut as you were pulling it out? A. That is true.

Q. When you found that he was not at the switchman's shanty and, as I understand it, you first went back to the east end of the rip yard— A. Yes, sir, I did.

Q. And at that time No. 5 was still pulling out?

A. Yes, sir.

Q. Do you know about how many of the cars had been pulled out at that time? Were you there until the entire cut had moved past him? A. I was there until the entire cut moved past.

Q. You still did not see him there, and where did you go? A. I walked down to No. 1 and looked over No. 1 at the east end.

Q. The east end of No. 1? A. Yes.

Q. How far down No. 1 did you walk at that time?

A. When I crossed over to No. 1, I was about six or eight car lengths in on No. 1.

Q. And did you walk west along No .1? A. I just
185 looked down No. 1.

Q. Then you went back to the switchman's shanty? A. Yes, I did.

Q. And then at that time you thought he might have ridden out into Yard L, or the train yard, with the cut of cars you had pulled off of 5, and you waited until the engine got back to the east gate? A. Yes, I was waiting for the engine to come back.

Q. Waiting for the engine to come back? A. Yes.

Q. That is, when you inquired of the engine whether Bill had ridden out to the train yard with them?

A. That is correct.

Q. Then after that you and the engineer started up through the repair yard and you walked up there along track 1 and he walked down along Track No. 5, is that right?

A. That is right. We walked down Track 5 and I crossed over to 1, and met him at the west end of 5.

Q. About how far was it from the west end of Track 1 that you crossed over to 1? A. Oh, I crossed over about fifteen car lengths in on 5.

Q. About what time was it when you had your
186 last conversation with your brother as the movement was pulling out of Track 2? A. It was pretty close to 8 o'clock.

Q. And about what time was it when you first got into the yardmaster's office? A. You mean after pulling 5?

Q. After pulling 5. A. Maybe 8:30, around there. I don't know.

Q. And the engine got back to the east end about 9 o'clock, is that right? A. Around 9 o'clock.

Q. And about what time was it when you found your brother's body? A. Almost immediately after that.

Q. That is, you just walked down, cut over the track 1 and came around as you were coming back?

A. That is right.

Q. That would take you ten or fifteen minutes, wouldn't it? A. Hardly.

Q. Five or ten minutes? A. Possibly that.

Mr. Hackbert: I think that is all.

The Court: Give counsel for plaintiff Defendant's 187 Exhibit 3 for identification.

You may take time to read it before you commence your redirect.

Mr. Ryan: All right, your Honor.

*Redirect Examination by Mr. Ryan.*

Q. Mr. O'Donnell, this paper marked Defendant's Exhibit 3 for identification, Defendant's Exhibits 3-A, 3-B and 3-C—consists of three closely—that is, two closely typewritten pages in single space, containing a lot of conversations and talk about cars and movements, and the third page consists of about a little less than a half a page, or a third of a page, of single spaced typewriting, is that correct? A. That is correct.

Q. Did you answer all the questions truthfully to the best of your ability when you were asked the questions by the claim agent? A. I certainly did.

Q. How do you explain the fact that you did not say anything about the wash-out signal or that the engineer made a rather belated effort to stop?

188 Mr. Hackbert: I don't believe that question is proper, for him to make an attempted explanation at this time as to his failure—

Mr. Ryan: No. If he had some reason for it, I submit—

The Court: Had you finished, Mr. Hackbert?

Mr. Hackbert: Yes.

The Court: Yes. Well, I will overrule the objection. You may answer, since it was brought out on cross examination that he did not do so. He may state.

The Witness: A wash-out signal is not an unusual signal, and a violent stop in answer to the signal is not unusual. That is what I asked for and that is what I got. I asked for a violent stop.

By Mr. Ryan:

Q. Well, you didn't particularly blame the engineer for anything, did you? A. Why, certainly not; if the equipment was in repair it wouldn't have broken.

Mr. Hackbert: I move to strike out the last part.

The Court: The last part may be stricken.

By Mr. Ryan:

Q. When your brother told you just before the
189 last movement was made when the coupling broke on the second car, on the second lead car, as the cars were moving, did you make any minute inspection of the space on that track or the width of the openings? Was that just your best judgment about it? A. Just my best judgment. As I looked down into the yard there.

Q. When you walked along the track to see that the cars were coupled, walked along No. 5, what was your purpose in doing that? A. To ascertain whether or not the couplings were made.

Q. So that you could pull them out of the east end?

A. That is correct.

Q. I believe you answered counsel that you found a place where the cars had not been coupled at the east end? A. He is referring to the extreme east end.

Q. Yes, sir. Well, I understood you previously—maybe I am in error about it—that you had stretched these cars previously, did you not? A. I had.

Q. And how do you account for there being a knuckle open at that end after you had done that?

190 A. In the yard there, that is not unusual, because there is a camp adjacent where we work, and occasionally we find a pin pulled after the cars are coupled.

Q. Mr. O'Donnell, when you walked along with your lantern along the cars to see that they were coupled, did you look down and inspect the track or the space alongside of the rails or underneath the cars at any time?

A. No, I just looked at the couplers.

Q. You have previously testified that that was the last movement you made in on that track? A. Yes, sir.

Q. All right. And there is not anything else in this statement that you want to talk about. I haven't read it all. Is there? A. No, sir, not to my knowledge.

Q. When you later examined the place where the brush marks commenced, was anybody with you? A. Yes.

Q. Who was with you? A. The yardmaster, Mr. Ralph Robinson.

Q. By the way, did you ask him to come here today so that we could ask him a few questions? A. I did.

191 Q. Is he here? A. Yes, he is.

Mr. Ryan: Your Honor, without runnning counter to your Honor's ruling, I would like to ask the witness if, during the years his brother worked there in the last few years, if he had acted in the capacity of conductor to his knowledge from time to time. With the court's permission, I would like to ask that question.

The Court: You may reopen the direct examination and ask that.

Have you any objection to his asking that question? That has not as yet been asked.

Mr. Hackbert: I will have to wait to see what the question is.

Mr. Ryan: Just what I said.

The Court: State the question.

By Mr. Ryan:

Q. You already testified your brother was qualified to act as conductor, haven't you? A. Yes, sir.

Q. Now, during the year or two that he worked with you steadily prior to his death, did he at all times act as a switchman or did he sometimes act as a con-

192 ductor? A. He acted as a conductor.

Q. Interchangeably with you? A. No. When he was on other jobs, I mean, Mr. Ryan.

Q. Then he did not work continuously with you for two years, did he? A. This last period, yes, about two years he worked with me.

Q. During that period he did not act as conductor, is that it? A. Not to my knowledge.

Q. But he was qualified and his seniority rights gave him the right to act as conductor? A. Yes. Of course, with the exception of when I laid off, he had charge of the engine.

Q. You men lay off occasionally, take a day or two off? A. I do.

Q. You said something in response to Mr. Hackbert's question about blocking this dump car, the ash car, and I am frank to admit I didn't understand what you meant by that. What did you have in mind about blocking?

193 A. Occasionally those cars will run in a westerly direction after they stop their motion, and to avoid that I stick a chock on it, to make sure it doesn't run.

Q. What? A. A piece of wood. We call it chock. A stick of wood, and stick it under the wheel.

Q. Did you do that? What is there about that that is of importance or significance? Did you do that?

A. Yes. I chocked the car, I put the block underneath.

Q. You blocked the car? A. Yes, so that it wouldn't run in a westerly direction.

Q. And where was it standing at that time with reference to any particular switch? A. I would say around No. 4 switch.

Q. And you understand the scale on our map indicates the distances between the switches there, so that the jury can understand and ascertain the distance by measuring it, is that correct? A. That is true.

Q. That map is drawn on a scale of 1 inch represents 20 feet, doesn't it? That is uniformly true both
194 north and south and east and west, is that correct?

A. Yes.

Q. So if you want to ascertain the distance from any given switch, from the switch point of Track 5 where I have my pencil here, to any given distance, to the switch point leading into Track 4, you simply have to measure the distance, don't you? A. That is correct.

Q. And that is uniformly true all the way along the line down to where you strike the switch leading onto 27? A. Yes, sir.

Mr. Ryan: I think that is all.

The Court: You may have recross examination on matters on which he was redirectly examined, and you may cross examine him on the additional matter brought out by counsel, with leave to reopen the direct concerning the additional duties of the deceased, if you care to cross examine on it.

*Recross Examination by Mr. Hackbert.*

Q. As I understand it, Mr. O'Donnell, there was nothing unusual about the stop which was made at the
195 time that this coupler broke? A. No, it was a violent stop. I asked for that. I got an answer to my signal. I was asking him to stop as hard and rapidly as he could, which he did.

Q. As he stopped, of course, each one of the cars that was being pushed by the engine, this 10 inches of slack would run out between each one of those cars along this stretch? A. Yes, it would run out just like a whip.

Q. And the two cars, or the two cars out at the end of that string— A. Yes.

Q. As the whip effect was felt between the second and third cars, the coupler broke? A. Yes, that is correct.

Q. And those two cars then moved on down the rip track and came in contact with the cars that were already standing there? A. Yes, sir.

Q. And the impact which resulted was not an unusually severe impact as switch movements go, was it?

A. Not for empty cars.

Q. Were those two empty cars? A. There were two empty cars.

196 Q. What about the three cars that were standing there? Were those empties or loaded? A. They were all empties on 5, all empties on 1.

Q. The whole string of cars on 5 were empty all the way down? A. My list showed them as empties. There may have been loads. Occasionally that occurs.

Mr. Hackbert: I think that is all.

Mr. Ryan: Will you look at your list—

The Court: The examination stops at recross examination under the rules of this court. He has just finished his recross examination.

I have one question, Mr. Witness.

You stated on redirect examination, in answer to a question from Mr. Ryan, if I understand correctly, there was a camp adjacent to this yard. Did you say that?

A. Yes, sir, I did.

The Court: And that frequently you would find a pin pulled. Am I to understand that theer is some relation between the camp and the occasional finding of a pin pulled? Was that what you intended to say?

The Witness: Yes, your Honor.

The Court: Explain that, will you?

197 The Witness: The transients—we would block their crossing there. They would have to crawl through the cars to get over to this boarding house.

The Court: And when they would do that—

The Witness: As a measure of revenge occasionally they would pull a pin on us.

The Court: I didn't understand. I didn't think the jury understood.

That is all. You may step down.

Mr. Ryan: Am I limited any further—

The Court: You are limited to recross examination unless you have leave to reopen the direct with something new.

Mr. Ryan: Your Honor, my desire was to ask the question about something he just answered on the recross examination.

The Court: No. You may not do that. The Witness will step down.

Mr. Ryan: With your Honor's indulgence, there is one matter I would like to ask him about that I forgot.

The Court: What is the matter?

Mr. Ryan: Reference to the clean break in the coupler that I wanted to ask him about?

198 The Court: That has already been gone into. Leave is denied.

The witness will step down.

(Witness excused.)

199 RALPH ROBERTSON, called as a witness on behalf of plaintiff, being first duly sworn, was examined and testified as follows:

*Direct Examination by Mr. Ryan.*

Q. Will you please state your name, sir?

A. Ralph Robertson.

Q. And where do you live, Mr. Robertson? A. 1012 West 5th Avenue, in Gary, Indiana.

Q. What is your occupation? A. I am assistant yardmaster.

Q. And you are employed by the— A. Elgin, Joliet and Eastern Railway.

Q. How long have you been employed by that railway? A. Twenty-seven years. Not fully as a yardmaster, of course.

Q. You commenced as a switchman, did you?

A. Yes, sir.

Q. And you became a conductor in time and then a yardmaster? A. And then advanced to yardmaster, yes, sir.

Q. How long have you been acting as a yardmaster?

A. Since 1939.

Q. Were you acting as such on the night of Janu-
200 ary 9, 1946 when Bill O'Donnell came to his death in the yard? A. Yes, sir.

Q. You know his brother Jack O'Donnell? A. Yes, sir.

Q. Who was on the witness stand here? A. Yes, sir.

Q. Did you know both of these men for a number of years? A. Yes, sir.

Q. By the way, how old a gentleman are you, may I ask? A. Forty-eight. Forty-seven or forty-eight. I think it is forty-eight.

Q. Now, did you, in company with Jack O'Donnell, go to Track 5 sometime after Bill O'Donnell came to his death, and make an inspection of that track in the vicinity of No. 5 switch? A. Yes, I did.

Q. And about what time of night was that, Mr. Robertson? A. Well, it was around 9 o'clock.

Q. And had the body been removed at that time?

A. No, sir.

Q. You were there before the body was removed?

201 A. Yes, sir.

Q. And what was the condition of the track at that time as to whether there were any cars on it?

A. There were no cars on the track at that time.

Q. Will you tell us just what you saw and give us some landmark as to where any marks you saw might be as you found them there? A. Well, I first went up there with a stretcher and I was told that Bill was dead and, of course, always learned through my experience in railroading that maybe the man is unconscious and he isn't dead, so I rushed up there with the stretcher, and he was lying down on his face at the time.

Q. Just what was his position? A. Well, he was—his body was lying outside of the rail on the north side of No. 5, and his arm was laying over the rail and right leg was laying over the rail and his head toward the east.

Q. Did you have lighted lanterns with you at that time? A. I had a lighted lantern with me, yes, sir.

Q. Where was his body lying with reference to some object there, so that we can identify the place?

A. I would say about three car lengths—well, no.

202 About two car lengths inside the lead.

The Court: What lead are you speaking of?

The Witness: Sir?

The Court: When you say inside of the lead, what lead are you speaking of?

The Witness: Well, that is the rip lead where the No. 5 goes off of.

By Mr. Ryan:

Q. Calling your attention to the switch point of No. 5 which leads from the rip lead to No. 5 proper, where was the body lying with reference to that switch?

A. That would be a matter of a couple of cars difference then. Between the point of No. 5 switch and

to clear the lead there would be at least a car and a half, possibly 60 feet difference there. Then there is about two cars and a half from that inside rail to where his body was lying. That is possibly another two and a half car lengths.

Q. Mr. Robertson, was there any sign in the track of any kind? A. Well, after I was satisfied that he was dead, why, I got to looking around to see what killed him because I seen nothing, only his arm and leg that might be cut off, and he was lying face down, and I
203 was looking around after I had taken ahold of his left—

Q. Will you pardon me, please? Was there a safety sign there of some kind between the rails of any of the tracks? A. Yes, they had their safety boards there, a big blue board, I would say about 2 feet by a foot and a half square, and got an iron rod on it, and there was another piece of iron there with a hook on it that they shove up when the men are repairing the cars during the day.

Q. Did you see any such sign as that between the rails of Track 5 when you saw the body, Mr. Robertson?

A. Yes, sir, there was this sign was laying down in the track.

Q. I assume it was down flat, was it? A. Yes, sir.

Q. Do you remember which way it was down? I mean was it down toward the east or was it back toward the west? A. It was down toward the east.

Q. Did you notice anything about that sign out of the ordinary? A. Yes, I did.

Q. What did you notice about it? A. It looked to me as though there was a fresh chip out of the
204 board of about, oh, it looked possibly 2 or 2½ inches off the edge of this board, and that is where the markings were seemingly that he was dragged from that point.

Q. And how far were the marks of dragging, how far did the marks of dragging extend toward the east? Describe it the best you can. A. I would say a little over a car length, about a car length or a little better.

Q. Where would you say that sign was at that time when it was down there and in the condition as you have described it with relation to No. 5 switch?

A. From the point, you are asking me again?

Q. Yes, from the switch point. As a railroad man, you know what I mean by the switch point?

A. Well, it is possibly 60 feet inside the lead and then, I don't know, it is about as far from here to that blueprint, is the difference there from inside the lead to the point. That is almost, not quite, a car length there.

Q. What were the lighting conditions there at that place at that time? A. Well, the same as they have most all over the yard. It is floodlights there.

205 Q. Is there a floodlight anywhere near that point?

A. They have a series of floodlights on top of the coal chute.

Q. Where is the coal chute with relation to the place I am talking about? A. That is about one hundred yards from that point.

Q. Do you remember what the weather was like that night? A. Well, it didn't seem to be any—I didn't really examine it, but there was no unusual darkness through the yard, so I assume that they were lighted.

Q. When you say there were some marks along, where were these marks? Were they between the rails or somewhere else? A. They were started between the rails and then they extended along inside the rail and then up to where the body was, was on the outside of the rail, and of course his right arm and right leg was inside the rail.

Q. Mr. Robertson, when you say, as you recall it, his body was outside of the rail, which rail are you speaking of? A. Outside of the track, on the north side of the track itself.

Q. The track runs in what direction there, Track 5? A. East and west, we call it.

206 Mr. Ryan: I think that is all.

The Court: We will recess at this time until 2 o'clock this afternoon.

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(Whereupon the further trial of the above-entitled case was recessed until 2 o'clock P. M. of the same day, Tuesday, September 30, 1947.)

• • (Caption—No. 46 C 1493) • •

207 Before Judge Campbell and Jury.
Tuesday, September 30, 1947,
2:00 o'clock P. M.

Court reconvened pursuant to recess.

Present:

Mr. Joseph D. Ryan,
appeared on behalf of plaintiff;
Mr. Harlan L. Hackbert,
appeared on behalf of defendant.

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208 The Court: Any further direct, Mr. Ryan?

Mr. Ryan: Your Honor, there is a question or two we did not get to.

The Court: You may ask him.

RALPH ROBERSTON, recalled as a witness on behalf of the plaintiff herein, having been heretofore previously sworn, resumed the stand, and testified further as follows:

*Direct Examination (Continued) By Mr. Ryan.*

Q. Mr. Robertson, I was asking you about where the flood light was located. What direction from Track 5 was the floodlight? A. They were south.

Q. You gave the distance previously in feet, did you?

A. Sir?

Q. Did you tell us how far they were south of there?

A. I believe I did, about 100 yards.

Q. How high is this floodlight above the surface of the ground? A. Possibly from the surface to number 5 switch would be about between 85 and 100 feet high.

Q. About how tall are the cars, these gons, or
209 hopper cars as they stand on the track? A. I would say the hopper car would run 15 feet high. The box car runs about 20 feet high.

Q. What is the fact as to whether there was any shadow cast along the north side of these cars on Track 5, assuming it was filled with cars?

Mr. Hackbert: I will object to that. There were no cars there when the witness was there that night.

By Mr. Ryan:

Q. I am assuming if there were cars standing, cars 15 feet high, standing along the track, a solid string of cars, what is the fact as to whether there would be any shadow cast along the north side of these cars?

A. Oh, certainly.

The Court: The jury is entitled to their own assumption in the matter. Objection sustained, and for the same reason I sustained a similar objection on your part this morning to a similar assumption that did not appear heretofore.

By Mr. Ryan:

Q. How wide are these cars, these larger cars?

A. About 12 feet—no, I would say about 10 feet wide.

210 Q. How much did they extend over the rail on either side, approximately? A. Approximately two and a half to three feet.

Mr. Ryan: I think that is all, your Honor.

The Court: You may cross examine.

*Cross Examination by Mr. Hackbert.*

Q. Mr. Robertson, as I understand it, you went to the scene of the accident some time after you learned that there had been an accident? A. Yes, sir.

Q. In other words, you were in the Yardmaster's office when the word came in? A. In the district.

Q. You went right up there and you found Jack O'Donnell there at that time? A. No, sir.

Q. Was Jack there at any time during the period of time that you were there? A. Yes, sir.

Q. Who, if anyone, was there when you got there?

A. No one outside of Bill laying at the rail. I found him.

Q. How long after you got there was it that Jack returned? A. Oh, possibly ten or fifteen minutes,
211 about ten or fifteen minutes. I don't know. I was busy at the time clearing away the—you see, on this track there, I would like to explain that point to you. Maybe I may be out of order. If I am, you might tell me.

You see, between this Number 5 track and the Number 4 track adjacent to it there is quite a space, a big concrete runway. Rather than to walk into this shadow where there is jacks and boxes and draw bars, that has been taken out and laid down, we do not walk right alongside of the cars. We walk over on this concrete. It is wide, similar to a driveway. It is almost as wide as a two-lane driveway.

Q. I will show you Defendant's Exhibit 1 for identification. And the concrete roadway at the left hand side of that is the driveway that you are talking about?

A. You see this part here?

Mr. Ryan: What exhibit is that? May I inquire what exhibit that is?

Mr. Hackbert: Defendant's Exhibit 1, your Honor.

The Court: Ask your question, please.

The Witness: Yes, sir.

212 By Mr. Hackbert:

Q. Mr. Robertson, the tracks which run down to the bottom of that photograph are respectively, the track on the right hand side is the rip track. Referring to the track on the left hand side—

A. That is the rip track lead. That is Number 5, and the last turn there is no switch. Of course Number 6 goes into Number 7.

Q. The tall building, at the right hand side of that picture is the coal chute? A. That is the coal chute. Here is a floodlight.

Q. The floodlight is up on top? A. That is possibly 100 yards from here to the coal chute, and there is flood lights on this side of the track. That is why I was walking here.

Q. You were walking along the concrete drive?

A. Yes. There is no flood lights on the north side of the track. That is why it makes it dark on the north side there.

Q. Mr. Robertson, as I understand it, you saw some marks along the track which indicated that some object had been dragged from the point opposite this sign down to the point where the body was found? A. It was not opposite the sign. It was right at the sign, right by it, right on it.

213 Mr. Hackbert: Will you mark this Defendant's Exhibits 4 and 5 for identification?

(Whereupon said documents were marked Defendant's Exhibits 4 and 5 for identification.)

By Mr. Hackbert:

Q. Mr. Robertson, I will show you what has been marked Defendant's Exhibit 4 for identification. I will ask you if that is a photograph of Track Number 5 in car repair yard looking in an easterly, or north-easterly direction. A. Looking easterly or north-westerly?

Q. I did not mean westerly, north-westerly direction?

A. That is better.

Q. That is correct? A. That is right.

Q. I show you Defendant's Exhibit 5 for identification. I will ask you if that is a photograph of the same area, only taken a little bit farther east than Number 4, taken with the camera a little bit farther east than the camera was when Number 4 was taken? A. These are both practically the same picture, only this jack is sitting here. Is that right?

Q. Yes. A. That is right. You got another car
214 here. You got the J, you got about a car length more view. They are both practically the same picture, only the jacks are not strung alongside of the tracks.

Q. Mr. Robertson, in Defendant's Exhibit 5 for identification, I call your attention to the space shown in the picture alongside of the north rail? A. Where is the sign board? It should be along about here. When did you take this picture?

Q. We have not gotten into that. We will have to pass that for the minute, Mr. Robertson. A. Oh.

Q. I call your attention back here north, the point where Track Number 5 branches off the rip track lead. Do you see the object there? That is the sign board that you have been talking about? A. What?

Q. Is that the sign board? A. It looks like it was that other switch. It don't look like the sign. In my opinion it should be right about down here where this switch is. That is right up against the lead. They don't put it up that close to the lead.

Q. Your recollection is that the sign was not that close to the lead? A. I don't think so. It should
215 be back down here about a car length and a half or two. That is not a sign.

Wait until I get my glasses on. It don't look like a sign board to me. It might be, if I have a closer up view. There is something there.

Q. You are not able to tell whether that is a sign board that you are talking about? A. I believe—it is not lying the right direction, though.

Q. That sign board can lay either direction, can it not? A. It is possible it does, yes. Of course, my acquaintance with the rip track is that this sign board is not that close to the lead. They might have changed it and put it there. I think it belongs down about here, according to my estimation.

Q. How well were you acquainted with that rip track yard? A. I worked on it for I don't know, probably between five to ten years myself.

Q. How long ago? A. That was in '38, '37 or '38.

Q. Since you have been Yardmaster you have not
216 had occasion to be up in that area? A. Oh, yes. It is my district. I get up there pretty often.

Q. Perhaps you had better put your glasses on again.

A. And leave them on.

Q. In Defendant's Exhibit 5 for identification, I call your attention to the space shown on that picture immediately to the right. A. Yes.

Q. Of the right hand rail of Track Number 5, as you are looking at the photograph. I will ask you if that area along there shows the marks? A. Yes, I think that is part of his pant legs down there, because one of his pant legs was torn loose. I left it there because I didn't want to pick it up.

Q. And the marks that show alongside of that rail are the marks you describe as having seen that night?

A. I would not say it was the same one. I was looking at it with the lantern light. This is the broad view of daylight. I would not say those were the same marks, or marks made from something else.

Q. You would not be able to remember? I would not definitely say I can remember it. I would not definitely say those marks are the same ones, that one place
217 up there looks just about where his pant leg was lying.

Q. Do you remember whether you saw his hat?

A. His hat?

Q. Yes. A. No. His hat was not on him when I picked him up. He was bareheaded when I picked him up, because I pulled him up by the hair of the head to see what killed him.

Q. Do you remember whether he had gloves on?

A. What?

Q. Do you remember whether he had gloves on?

A. No. He had—he didn't have a glove on his left hand.

Q. You came in here today at the request of Jack O'Donnell? A. Sir?

Q. You came in here today at the request of Jack O'Donnell, to testify for Jack O'Donnell? A. Yes. He called me at my home this morning.

Q. You didn't come in response to a subpoena, but just when he asked you? A. That is right, sir.

Mr. Hackbert: That is all.

218 The Court: Any redirect?

Mr. Ryan: Yes, your Honor.

*Redirect Examination by Mr. Ryan.*

Q. This first photograph that counsel showed you, Defendant's Exhibit 1, the camera is facing east, as you understand it in that photograph, is it not? A. Yes. Then Number 5, Number 6, and that is Number 7.

Mr. Ryan: Mr. Hackbert, you haven't any notation or legend on the photographs as to where the camera was placed on any of these pictures.

Mr. Hackbert: No, there isn't any on the pictures. I will prove up where they were taken.

Mr. Ryan: But it is a fact, is it not, the photographs do not show relative distances correctly, are not supposed to, do they?

Mr. Hackbert: I think I will object to that. I don't know that the witness is qualified to say that.

The Court: Sustained.

By Mr. Ryan:

Q. Could you tell by looking at that exhibit 1 how far down that sign board—

By The Witness:

219 A. I know the territory like a book. Sure. I am 25 years on there. I know it all.

What was your question?

Q. I had not finished it. A. All right.

Q. Could you tell by looking at that picture how far down the track that sign is that is lying down there from looking at that photograph? A. From Number 5 points?

Q. Yes. You couldn't tell by looking at the photograph? A. I am just trying to figure it out. It is a little better than two car lengths.

Q. Will you pardon me?

You can't tell by looking at the photograph how far it was, could you? A. Not exactly. I couldn't come close to it.

Mr. Ryan: That is all I want to know. Thank you. The other pictures are Numbers 4 and 5.

The Court: Defendant's Exhibits 4 and 5. Are they your 4 and 5 or Defendant's Exhibits?

Mr. Ryan: Defendant's Exhibits 4 and 5.

The Court: Specify for the record.

By Mr. Ryan:

220 Q. Defendant's Exhibit 4. Looking at Defendant's Exhibit 4, the camera is evidently facing in a westerly direction in that picture, is it not? A. That is right. You can tell which way they are.

Q. In other words, you are on the north side of the track there looking west? A. Yes.

Q. It shows space between that track and the concrete walk that you have described. A. That is right.

Q. I mean on that picture you could not tell how far from the given point those objects are that are shown in the picture, could you? A. No, sir, I couldn't.

Q. Is that also true of Defendant's Exhibit 5, Mr. Robertson, that picture? That picture, that is Number —I handed you 5 previously. Now, look at Number 4. That is also facing west, isn't it? A. That is right. You can't tell distance by this. The camera is too far back.

Mr. Ryan: Thank you.

The Witness: I couldn't tell whether it is 10 or 20 or 25 feet.

Mr. Ryan: That is all.

221 Mr. Hackbert: That is all, Mr. Robertson.

The Court: That is all. You may step down.

(Witness excused.)

SARAH O'DONNELL, the plaintiff herein, called as a witness in her own behalf, having been first duly sworn, was examined, and testified as follows:

*Direct Examination by Mr. Ryan.*

Q. Will you please state your name, Madam?

A. Sarah O'Donnell.

Q. You are Mrs— A. Mrs. Sarah O'Donnell.

Q. Are you the widow of William O'Donnell, who came to his death January 9th, 1947? A. That is right.

Q. What is your age, Mrs. O'Donnell? A. 43.

Q. When were you 43? A. August 7th of this year.

Q. Are you the administratrix in this case?

A. That is right.

Q. You were appointed in your own county in Indiana, were you? A. That is right.

222 Q. What is the date of your marriage to William O'Donnell, the deceased? A. August 7th, 1923.

Q. Will you keep your voice up a little? A. Yes.

Q. 1923? A. August 7th, 1923.

Q. Did you live with your husband during his lifetime continuously? A. Yes, sir.

Q. How many children have you? A. Four.

Q. Will you start with the oldest and tell me when he was born? The oldest name is— A. Elizabeth Joan. She was born August 17th, 1925.

Q. So she was 20 at the time of your husband's decease, was she? A. Yes, sir.

Q. And the net oldest? A. Is William R., William Ralph.

Q. He was born when? A. September 14th, 1930.

By The Court:

223 Q. What year? A. September 14th, 1930.

By Mr. Ryan:

Q. The next one, Mrs. O'Donnell? A. Marlene Catherine.

Q. When was she born? A. October 26, 1940.

Q. 19, what? A. 1940.

Q. Are you sure? A. 1938, I beg your pardon.

Q. She was seven years of age at the time of your husband's death? A. That is right.

Q. And the next one? A. Richard.

Q. Richard M.? A. That is right, Richard Michael.

Q. He was born when? A. January 19, 1940.

Q. He was six years of age at the time of the death of the deceased? A. He was within a few days after his father's death.

224 Q. I didn't hear you? A. He was within a few days after his father's death, yes.

Q. And the youngest? A. He is the youngest.

Q. That is the youngest? A. Yes.

Q. Are these all of the children still living with you?

A. Yes.

Q. The oldest is now at work, is that correct?

A. Yes, she is employed.

Q. Where is the boy? Is he going to school? A. He is in school, yes.

Q. And the other two have been here in court?

A. Yes.

Q. Mrs. O'Donnell, by the way, what was your maiden name, may I ask you? A. My maiden name was Sarah Roth.

Q. What was your occupation before you were married? A. I was a stenographer.

Q. Were you also a teacher at one time?

A. No, I was not.

Q. I am mistaken about that.

225 Did you make a record for a few years previous to your husband's death as to his actual earnings during each month and each year? A. Well, I have a list here. I do not know by memory. If you will allow me to read that off.

Q. I say did you keep a record of his earnings?

A. Yes. I have a record of his earnings.

Q. Commencing in the year 1942 and continuing right up to the time of your husband's death? A. Yes.

Q. What did you make the record from? A. The income tax blank.

Q. Was he paid by check? A. Yes. He was paid by check.

Q. How often? A. Semi-monthly.

Q. What did he do with his checks semi-monthly?

A. Brought them home.

Q. And it was from these checks that you made your record? A. That is right.

Q. Have you the record with you as to what his earnings were? A. I have for the last several years.

226 Q. Have you the records with you relative to the years that I am asking about, commencing in 1942 up to and including the year of his death? A. I do not have the record. I have a list of the earnings.

Q. You have your memorandum that you made from his checks? A. Yes, that is right.

Q. Can you tell us from memory just what he earned?

A. I can't from memory.

Q. Can you tell us accurately and exactly what he earned during these years from your list? A. Yes, if I may be allowed to.

Q. I think you may, with his Honor's permission.

The Court: If you care to have it marked, you might as well have it introduced in evidence.

My Ryan: I don't think it is in very good shape.

The Court: Read them off to the reporter.

Mr. Ryan: Read them off.

A. It is a notation that I made on a slip of paper.

The Court: You may use it to refresh your recollection, then, to comply with the question.

By Mr. Ryan:

Q. Wait a minute. Just listen, please, to the ques-
227 tion. I want you to start in 1942. I do not want to go back any farther than that. Commencing at 1942, what were his earnings for that year? A. In 1942 his earnings were $3,348.96.

Q. '43? A. $3,661.48.

Q. '44? A. $3,625.24.

Q. And '45? A. $3,366.81.

Q. And 1946, up to the time of his death what were his earnings? A. $96.08.

Q. Mrs. O'Donnell, have you been employed? Have you been engaged in any occupation since your husband's death? A. No, I have not.

Q. What is the condition of your health? A. Not too good.

Q. In what respect is your health not too good?

A. Well, I have an ulcer on one of my intestines.

Q. Did you keep house for your husband and live with him continuously up to the time of his death?

A. That is right.

228 Q. What were his habits and what were your relations? A. He was a very good provider. He was a good husband. He was a good father. He did not drink.

Q. Did he bring all of his earnings home to you and the children? A. That is right. He was a hard worker.

Q. By the way, do you know what his daily wage was? A. Yes. I believe at the time of his death as a switchman he earned nine-sixty. When he was conductor, he earned, I believe, ten-nineteen.

Mr. Ryan: You may cross examine.

*Cross Examination by Mr. Hackbert.*

Q. Mrs. O'Donnell, you and your husband lived together where? A. 4241 Maryland.

Q. Gary, Indiana? A. That is right.

Q. Had you lived in Gary all your married life?

A. That is right.

Q. During all the time that your husband was employed by the E. J. & E., and after you were married, he worked there at Gary? A. That is right.

Q. And following his death you were appointed
229 administratrix of his estate by the Lake County Superior Court at Gary? A. That is correct.

Q. You still live at Gary with your four children?

A. That is right.

Q. This information as to your husband's earnings, am I right in understanding that you took those figures from the copies of his income tax return? A. Yes. Then I had some of his old checks.

Q. Were those his federal income tax returns or his Indiana gross income tax returns? A. I think I had both of them pinned together.

Q. And of course he returned the same figures as his total earnings in both places? A. That is right.

Q. The amount that you have given us for each of these four years represents the total amount of his earnings that he reported for tax purposes? A. Yes.

Q. You have to say yes or no, because the reporter does not see you nod your head. A. I believe so.

Q. In other words, this figure includes the deductions that were made, withholding tax for federal in-
230 come tax purposes, and it also includes the amounts which were deducted from his wages for railroad retirement tax.

Mr. Ryan: I object to that, if your Honor please, and I do not understand her testimony to be to that effect at all.

The Court: No. I do not see the materiality of it, either. Sustained.

By Mr. Hackbert:

Q. Do you have the figures, Mrs. O'Donnell, which go back beyond the year 1942? A. I believe I have for the year '41.

Q. How far back do the figures that you have go?

A. Right here with me, just to '41.

Q. Just to '41? A. Yes.

Q. What were his earnings for the year 1941?

A. $3,303.45.

Q. Does the memorandum that you have indicate his earnings for any of the previous years? A. No.

Q. Have you given Mr. Ryan a memorandum of his earnings for any year earlier than 1941? A. I may have.

Q. Do you have that memorandum that goes back?

231 Mr. Ryan: I object to that as entirely immaterial, your Honor. I would not be permitted to go back more than two or three years.

The Court: He is not sworn, anyway. I would not want his testimony unless you swear him and put him on the stand. Sustained.

Mr. Hackbert: He is objecting?

Mr. Ryan: I am objecting to your going back that far. You would not permit me.

The Court: I am objecting to your making him your witness at this time.

Mr. Ryan: I object to the question, your Honor, on the ground it is entirely immaterial. If you can go back twenty years, because it is too remote from the time of his death to be material evidence.

The Court: Since I am not going to allow him to ask you anyway, it is all right.

He has not asked it yet. Maybe he will. Then you object.

By Mr. Hackbert:

Q. Mrs. O'Donnell, do you know what your husband's earnings for the year 1940 were?

Mr. Ryan: I object to the question, your Honor, on the ground that it is too remote.

The Court: 1940, I will permit her to answer if
232 she knows.

Q. Do your recall A. I can only make a guess at it, your Honor.

The Court: Did you want her to guess?

By Mr. Hackbert:

A. Approximately what was it? A. I believe between twenty-eight and twenty-nine hundred dollars.

Mr. Hackbert. I think that is all.

Mr. Ryan That is all.

By The Court:

Q. What was your husband's age at the time of his death?

By The Witness:

A. He had reached the age of 45 the previous November 5th.

Q. 45 years old. When you last saw him alive before this accident, was he in good health? A. Yes.

The Court: That is all. You may step down.

(Witness excused.)

Mr. Ryan: We rest, your Honor.

The Court: The plaintiff rests.

And Thereupon the Plaintiff Rested Her Case.

233 And thereupon the defendant to maintain the issues on its part, introduced the following evidence, to wit:

ARTHUR H. COGSWELL, called as a witness on behalf of the defendant herein, having been first duly sworn, was examined and testified as follows:

*Direct Examination by Mr. Hackbert.*

Q. Will you state your name? A Arthur H. Cogswell.

Q. Where do you live, Mr. Cogswell? A. Gary, Indiana.

Q. By whom were you employed? A. Elgin, Joliet & Eastern Railway Company.

Q. In what connection? A. Division Claim Agent.

Q. At Gary? A. Right.

Q. Were you Division Claim Agent of the E. J. & E. in Gary, January, 1946? A. I was.

Q. Did you learn of an accident to William O'Donnell?

A. I did.

Q. When did you learn of that accident? A. Around ten or ten-fifteen that night.

234 Q. And after you first learned of that accident, what if anything did you do? A. I went out to the yard, Kirk Yard.

Q. Where is Kirk Yard located? A. It is north of the town of Gary and west of the main part of town.

Q. And approximately how much territory does Kirk Yard occupy? A. Oh, it is possibly two or two and a half miles long, and possibly three-quarters of a mile wide.

Q. And did you go to the car repair yard, particularly Track 5 in the car repair yard that night?

A. I did not.

Q. When did you first go to Track 5? A. Nine-thirty the following morning.

Q. Mr. Cogswell, what experience have you had in taking photographs? A. I have been taking photographs for around 25 years.

Q. And did you take some photographs in that locality that morning? A. I did.

Q. What time of the morning was it when you took the photographs? A. About nine-thirty A. M.

235 Q. I show you what has been marked Defendant's Exhibit 1 for identification. I will ask you if that is one of the photographs which you took at that time? A. Yes.

Q. Will you tell us where the camera was placed and in what direction the camera was pointed at the time the picture was taken? A. The camera was standing just about opposite Number 5 rip switch, facing east.

Q. When you say it was standing opposite the switch, what part of the switch do you mean? A. I was just about in the center of the rip track lead and opposite Number 5 switch, by the switch stand, I mean.

Q. By the switch stand? A. By the switch stand. That is at the western end of the switch proper.

Q. What are the tracks which are shown? A. The track to the left is Number 5. The one in the middle is 6. The one down at the opposite end is 7.

Q. Mr. Cogswell, I call your attention to an object that appears to be between the rails of Number 5
236 rip track, in about the center of the photograph.

I will ask you what that object is?

A. That is what is known as a stop sign used on the rip track.

Q. In what direction is that stop sign lying in that picture? A. On this picture it was lying towards the west of the stand.

Mr. Ryan: That is not quite plain, Mr. Cogswell.

The Witness: A. It was lying to the west of the upright.

Mr. Hackbert: Will you mark this Defendant's Exhibit 6 for identification?

(Whereupon the said document was marked Defendant's Exhibit 6 for identification.)

By Mr. Hackbert:

Q. Mr. Cogswell, I show you Defendant's Exhibit 6 for identification. I will ask you if that was another of the photographs which you took that day? A. It is.

Q. And where was the camera placed and in what direction was the camera facing? A. The camera
237 was in the center of the rip track lead, about 50 feet west of the switch point of Number 5 rip track.

Q. The switch which shows in that picture is the switch at which you were standing in the previous photograph, is that right? A. Yes, sir.

Mr. Hackbert: If your Honor please, I offer in evidence Defendant's Exhibits 1 and 6 for identification, and ask leave to show them to the jury at this time.

The Court: Do you have any objection? Would you rather cross examine on them before he offers them?

I would rather you finish with the witness.

Mr. Ryan: I only have a question or two, your Honor.

The Court: Yes. Finish with the others. Then let him cross examine, and then I will let the jury look at them.

Mr. Ryan: I only have a question or two, your Honor.

Mr. Hackbert: Very well.

By Mr. Hackbert:

Q. Mr. Cogswell, I show you Defendant's Exhibit 2 for identification, and I will ask you where the camera was placed, and in what direction the camera was facing in that picture?

238 By The Witness:

A. This was taken from the first place as the first picture. I was standing in the center of the rip track lead opposite Number 5 rip switch, and the camera was facing to the west.

Q. In other words, that shows the rip track lead back up in the direction which runs towards the left of the blue print? A. Yes, sir.

Q. I show you Defendant's Exhibit 4 for identification, and I will ask you where the camera was placed, or in which direction the camera was facing? A. The camera was standing immediately north of Number 5 rip track, and it was standing approximately 75 feet from the guard rail of the frog of Number 5 rip track.

Q. What do you mean by the guard rail of the frog, Mr. Cogswell? A. That is the rail that is attached to the outside rail of the track, opposite a frog to help keep the wheels on the tracks at that particular turn-out.

Q. I show you again Defendant's Exhibit 1 for identification, and I will ask you if the intersection of the two tracks, or two rails, rather, in the center of that pho-
239 tograph is what you refer to as the frog?

A. The frog is right in the center of the two tracks. The guard rails are to the right and left of the outside rails.

Q. And the guard rails to which you have referred in speaking of Defendant's Exhibit 4 is the guard rail which appears on the left hand side of Defendant's Exhibit 1?

A. Yes, sir.

Q. And was the distance calculated with reference to the east or west end of that guard rail? A East end.

Q. I will show you Defendant's Exhibit 5 for identification, and I will ask you where the camera was placed, and in what direction the camera was facing? A. The camera was immediately north of the north rail of the rip track Number 5, standing about 90 feet east of the east edge of the frog opposite where the guard rail of the frog of Track Number 5.

Q. Mr. Cogswell, did you make any inspection of the ground in the area in which these pictures were taken?

A. I did.

Q. What if anything did you observe? A. I ob-
240 served a mark on the inside of the north rail 30 feet east of the east edge of the guard rail at that particular Number 5 track frog. That was the blood mark on the inside edge of that rail. 14 feet from that mark east there was a glove and cap immediately north of the north rail.

75 feet east of the east end of the guard rail there was a mark that indicated that whatever was dragged at that particular point had stopped there. There were drag marks from a point immediately east of the blood marks on the rail to the point 75 feet east of the guard rail.

Q. So that these drag marks extended continuously for a space of 45 feet? A. Yes, sir.

Q. This first mark that you refer to, 30 feet east of the guard rail, where was that mark with reference to this sign in the middle of the track, if you know?

A. I should judge about four or five feet east of the sign.

Q. Mr. Cogswell, I will ask you to examine these pictures and tell us whether or not—

The Court: Identify them for the record.

241 By Mr. Hackbert:

Q. Defendant's Exhibits 1, 2, 4, 5 and 6 for identification.

I will ask you if those drag marks to which you refer to appear in any of those photographs?

A. They appear in Exhibit 4.

They appear in Exhibit 5.

You cannot see them in Exhibit 6.

I doubt whether you could identify the marks in Exhibit 1. They do not appear in Exhibit 2.

Q. I call your attention in Exhibits 4 and 5 for identification to the object in the center of the track which you have identified as Number 5 rip track. I will ask you whether or not that is the sign board to which you refer? A. That is.

Q. And I call your attention to any object, perhaps two objects that appear immediately to the right of the north rail in those two pictures. I will ask you whether or not that is a hat and glove to which you refer?

A. It is.

Q. In the course of your duties as Division Claim Agent, did you make an investigation of this accident

242 A. I did.

Q. In the course of that investigation did you ascertain the identity of any person who saw or claimed to have seen the accident itself? A. I did not.

Q. There is one question which I failed to ask. Do these five pictures which I have shown you, Defendant's Exhibits 1, 2, 4, 5 and 6 for identification, correctly represent the conditions as you saw them there in the vicinity of Number 5 rip track at nine-thirty in the morning of January 9th, 1946? A. January 10th, I believe.

Q. January 19th? A. They all do.

Mr. Hackbert: I offer the pictures in evidence, if your Honor please, as Defendant's Exhibits 1, 2, 4, 5 and 6.

Mr. Ryan: Your Honor, I have no objection to the photographs, but I think that photographs, so many of them will confuse the jury unless there is a notation on each picture where the camera was placed and in what direction it was facing. It is impossible for me even—

243 The Court: I think it is a good suggestion. I mean the jury may look at the mright after the testimony of the witness, if you care to. Before they go to the jury room, mark them in accordance with this man's testimony. He has testified where he put his camera when he took them. I think Mr. Ryan's suggestion is very good. Have them marked on the back exactly where it was.

The exhibits will be received in evidence, 1, 2, 4, 5 and 6, on behalf of the defendant.

(Which said photographs so offered and received in evidence were marked Defendant's Exhibits Numbers 1, 2, 4, 5 and 6.)

244 The Court: Proceed with the cross.

*Cross Examination by Mr. Ryan.*

Q. You can note on the back of each picture just where your camera was placed with reference to these permanent physical objects that you located, can't you?

A. I can.

Q. And then we can understand just what we are looking at, and where, is that right? A. Yes.

Q. You say you were notified of this accident on the night previously? A. The night of the accident I was notified.

Q. At ten o'clock? A. Around ten or ten-fifteen. I don't remember exactly.

Q. Didn't you go to the Yard that night?

A. I did, sir.

Q. What time did you get there? A. Oh, possibly ten-thirty, a quarter to eleven, somewhere along in there.

Q. Had the body been removed at that time?

Yes, sir.

245 Q. Who was present there that knew anything at all about the accident when you got there?

A. I do not believe I talked with anyone that had any knowledge of the accident that night.

Q. You didn't talk to anybody that night who might have had any knowledge of it, did you? A. No, sir, I didn't. There was no one there that knew anything about the accident. They had all gone home.

Q. That is, there was no one in the yard, any member of the crew, you mean? A. That is right.

Q. Was your Yardmaster still on the job?

A. I don't know whether Mr. Robertson was still on the job or not.

Q. Did you look for him? A. I did not. I wasn't in that part of the yard.

Q. Where is Mr. Robertson's office? A. His office is in the vicinity of the place of the accident, possibly within a half a mile of the place of the accident.

Q. But you didn't go to the place where it was known at that time that O'Donnell was killed, did you?

A. I didn't.

246 Q. When you came back the next morning, so that the first thing you did was to take photographs of Track 5? A. I had had the reports in the office. I knew where the place of the accident was at. I went to the place of the accident. I took the photographs.

Q. What reports did you have at that time in your office? A. It was possibly a telephone report, or something of that nature that I had gained the exact location from the Yardmaster.

Q. Where did you get the information around nine o'clock the following morning that it happened that the man was killed on Track 5? A. I would say from the general Yardmaster at this time.

Q. Who is the general Yardmaster? A. C. P. Farr.

Q. He was not on the job at nine o'clock the night previous, was he? A. I don't know.

Q. He was the day Yardmaster? A. He was the general Yardmaster in charge of the yard at all times.

247 Q. He works during the day, and not at night, doesn't he? A. He works both times.

Q. Do you know whether he was on the job the night previous, or not? A. I do not.

Q. You do not have any reports from any of the crew in writing as to what happened, what caused the accident, or anything else? A. I doubt very much whether I did at that time.

Q. When was it that you made a further investigation? You told counsel you made an investigation of this accident. When did you make your investigation?

A. I had most of the crew in within a day or so after the accident. Possibly the eleventh or twelfth. I had Mr. O'Donnell in, possibly five or six days after the accident.

Q. That was after you had taken these pictures?

A. That is right, sir.

Q. Were the tracks clear as the pictures show at that time? A. The pictures illustrate exactly what I found at that time.

248 Q. Isn't that a most extraordinary situation to find these tracks clear of cars at that time in the

morning? A. I do not believe so. There are times when you will find the tracks clear.

I don't know whether this accident kept the department from putting anything in those tracks or not. It is possible that they restricted the use of that track until the inspection of the location was made.

Q. Where would you say the stop sign that you say had been flung over and was lying down towards the west, where was that with relation to the switch on Number 5 that you mention? A. The exact location of it is about 34 to 35 feet east of the east end of the guard rail at that particular switch.

Q. Well, I am not so sure the picture shows the guard rail.

Where would it be with relation to the switch stand or switch points, how far is it? A. I would say about 80 feet east of the point of Number 5 switch.

Q. The point of the switch is right at the switch
249 stand, or approximately, isn't it? A. That is right.

Q. Did you have good daylight when you took the pictures? A. It was a winter day, not too good.

Q. Was it snowing that morning? A. No, it was not snowing.

Q. You didn't take any close-up of the stop sign, did you? A. Only what is in the picture there.

Q. You didn't get right over it so that you could see the condition of the stop sign, did you? A. No, sir.

Q. By the way, was there anything permanently attached to that sign where it stood at that place? Was there any permanent attachment, any fixture in the rail or in the ground there which would keep it in the same place? A. Yes, sir. The sign is fastened to a tie.

Q. How is it fastened to the tie? A. The bottom of the upright is like a T, upside down T that fastens in the proper arrangement, that is fastened to the tie so that the sign will move in either direction.

Q. So that you could swing the sign towards—
250 the stop sign towards east or towards the west, could you? A. Yes, sir.

Q. You do not attach any significance to the direction the stop sign was facing at that time? A. I do not attach the significance—

Q. You do not attach any significance to it now, do you? A. As far as I am concerned, I do not.

Q. You don't know what condition it was in the night before when the accident happened, do you? A. I do not.

Q. You don't know whether somebody turned it over or not, do you? A. I do not.

Q. Did you find any evidence of damage to it, where somebody's foot apparently had caught on it?

A. I did not observe.

Mr. Hackbert: I object to that as not being supported by evidence. He never said anybody's foot was caught on it.

The Court: Sustained.

Mr. Ryan: There is evidence that apparently the toe of his shoe caught on the sign.

251 Mr. Hackbert: I think, if your Honor please, there was no such evidence. I ask that the jury be instructed to disregard the statement.

Mr. Ryan: I object to the statement there is no such evidence. That is something there is evidence on.

The Court: No. I agree with counsel for the defendant. The jury will disregard the remark of counsel for the plaintiff. Objection sustained.

Mr. Ryan: Your Honor, could I refer to the reporter's record on that?

The Court: Proceed with your examination.

Mr. Ryan: Q. Did you see any chip out of the sign apparently where something caught on to it and took the chip off?

Mr. Hackbert: I object to that question.

The Court: Overruled. There is evidence there was a chip off the sign. That was the testimony.

Mr. Hackbert: There is evidence about that where the chip apparently was found.

Mr. Ryan: I object to counsel agreeing with the Court.

The Court: Read the question.

(The last question read as recorded above.)

252 The Court: Objection overruled. He may answer.

The Witness: I did not observe anything on the sign of that type.

By Mr. Ryan:

Q. Would you say there was anything of that type on the sign at that time? A. I would not say there was or there wasn't.

Q. All right. This correctly shows the ground in one of these pictures, Number 5, Mr. Cogswell, shows the ground immediately adjacent to Track 5, then between Track 5 and the cement walk, doesn't it? A. May I see the picture?

Q. The camera, that is facing west.

The Court: For the record, what picture is the witness looking at?

Mr. Ryan: Number 5.

The Witness: 5.

Mr. Ryan: I am only handling Defendant's Exhibits. It is Defendant's Exhibit 5.

The Court: Very well.

By Mr. Ryan:

Q. That shows correctly the space in there and the walk in question, doesn't it? A. Yes, sir.

253 Q. And that is true of Number 4, too. That is also facing north? A. Yes, sir.

Q. Now, Number 6. Your camera is placed looking east, is it, in what track? A. In the center of rip track lead.

Q. That is how far west of this Number 5 switch that you have been talking about? A. About 50 feet.

Q. By the way, these brush marks that you say between the tracks when you took these pictures, could you tell what made the marks? What do they look like?

A. They look like something had been dragged along there.

Q. What do you mean, the leg of a pants, a body, or what? A. I would not know whether it was a sack of cement or a body, or what. The marks do not indicate what was dragged there.

Q. I believe you stated at one point there was some blood on one of the rails or track? A. There was.

254 Q. Which rail was that? A. Inside of the north rail of Track Number 5.

Q. Where was that with relation to the sign that was tipped over there? A. I would say that was about 20—about, let us see, 34 or 5 feet east of the sign.

Q. Did the marks continue past, the glove marks?

A. That is where the marks started.

Q. Didn't you tell us they started a little east of the sign, Mr. Cogswell? A. I told you they started about four or five feet east of the sign.

Q. The sign, you are speaking of the sign when it was turned over towards the west, aren't you?

A. Speaking of the sign, it is attached to the tie.

Q. So that the marks commence about four or five feet from that point? A. That is right.

Q. Then they continue down to the blood spot, did they? A. That is where the blood spot is.

Q. 4 or 5— A. 4 or 5 feet from the upright of the sign.

Q. Then your other answer, you wish to correct
255 the answer you just made? A. I think my other answer, I was referring to the distance.

Q. When I asked you where the blood spot was on the rail you gave us a certain distance there a moment ago, did you not, as 30 feet? A. About 30 feet east of the east end of the guard rail.

Q. No, no. I was not talking about the guard rail. Didn't you tell me it was 30 feet east of the stop sign?

A. If I did, I was mistaken, sir.

Q. You want to correct that, nyway? A. If I made the statement there, I wish to correct it.

Q. How far do you claim the brush marks continued?

A. They continued to a point 75 feet east of the east end of the guard rail.

Q. Well now, I am not so much interested in the guard rail, if you will pardon me.

Will you tell me how far they extended in feet after you picked them up? How far did they go towards the east? A. 45 feet.

256 Q. Where was the blood mark with relation to where they commenced, at the point of where they commenced? A. The blood marks were immediately west of the point where the drag mark started.

Q. They were not at the point where the drag started? A. Within a foot or so.

Q. I see. So that at the point, at the point where the marks commenced you found a blood spot within a foot of the point of the rail, did you? A. That is right, sir.

Q. Did you find anything else there, any blood anywhere else? A. That is the only place where I noticed blood on the rail, was on the ball of the rail, face of the rail, on the inside edge of the rail.

Q. Was there any on the ball of the rail? A. No.

Q. Was there any blood anywhere in there that you observed that was there when you took the photographs?

A. Well, there was indications of blood at the point where the mark stopped 75 feet east of the guard rail. They were in the oils, or in the ground there. I would not say they were blood marks or not, but it indicated to me they were.

257 Q. Did they look like blood? A. It looked like blood to me, although it was very dirty.

Q. Was it inside between the rails, or outside of the rails? A. Most of that was outside of the rail.

Q. That was the north rail of the eastbound track, Number 5 track, was it? A. North rail of Number 5 track.

Q. Did you learn that night or next morning that one of your couplers broke on one of your cars and caused some cars to run ahead for a distance and crash into other cars? A. I learned that when I saw the crew in the office next day or so after the accident.

Q. Did you trace the car involved that broke loose?

A. I found out what the car number was from Mr. O'Donnell's list that he gave me at the time that I talked with him.

Q. Didn't you know what the car number was before you talked to Mr. O'Donnell? A. I rather think I did. I think it was on some of their reports that came into the office in the next day or so.

258 Q. When did you see that car inspected?

A. I looked over that car the night of the accident for blood marks.

Q. Where was the car when you looked at it that night? A. Clear over on the south side of the yard on the sub-station, what is known as a sub-station.

Q. Was it attached to other cars? A. No, sir, it was not.

Q. And moved over there singly? A. I don't know. The train had been broken up by the time I got out to the yard.

Q. Did you examine the coupler on one end of the car?. A. I did not examine the couplers on the car. I was only looking for the marks on the wheels, to see if I could discover what car had passed over the body.

Q. You knew that particular car had a broken coupling, didn't you? A. Not at that time I didn't.

Q. You didn't have it inspected? A. I didn't inspect the car. I didn't have it inspected. I was only looking for the marks on there.

259 Q. What became of that car? When did you have it inspected? A. Why, that car was inspected the following day.

Q. Who made the inspection? A. I don't know from memory.

Q. What information did you get in your investigation as to what happened to the coupler on that car?

A. The members of the crew told me the coupler was fractured and parts of it had fallen from the car, apparently. The entire coupler was not complete at the time of the inspecton after the accident by the members of the crew.

Q. What car was that, what umber? A. I don't remember.

Q. What was the name of the owner of the car?

A. I cannot even remember that.

Q. When did it go out in service again? A. I don't know.

Q. When was it repaired? A. I don't know.

Q. How long had it been in service? A. I don't know.

Q. When had any inspection been made of the couplers previously to that, to the night of the accident?

260 A. I could not tell you.

Q. You were just simply interested in finding out if there was any blood on the wheels? A. I wanted to ascertain the car that had run over the man, if I could.

Q. Did you examine any other cars? A. I found every car that had been taken out of the rip track that night and looked at every one of them.

Q. How many cars did you look at that night?

A. Somewhere in the neighborhood of 25 to 28 cars, if my recollection serves me right.

Q. 25 to 28? A. Somewhere.

Q. Where were they? A. They were scattered all over the yard. They were in several tracks.

Q. You mean the same night of the accident you inspected all these cars to see if there was any blood on the wheels? A. I did, sir.

Q. Did you expect to find blood on some of the car wheels? A. You usually do.

Q. You usually do? Have you had experience in 261 cases where a man was run over, where he was cut in two, his arms and legs were cut off? A. Yes, I have.

Q. You have experience? A. Yes.

Q. You expect to find blood on the cars after they had moved several miles to where they were placed? A. It has been found, yes, sir.

Q. That is what you were looking for that night?

A. Yes, sir, that is right.

Q. What time did you go home to sleep that night?

A. Oh, possibly twelve or one o'clock.

Q. But you covered all the 28 cars? A. That is right, sir.

Q. Did you look at any other car, any single car that may have run over him and killed him? A. I couldn't find any evidence on any car that any of them had run over.

Q. Did you look at any single car? Did you make any inspection of any single car other than the cars that were on Track 5 when this accident happened? A. That is the only cars I looked at.

Q. You did not make any inspection of any dump
262 car or ash car? A. I didn't.

Q. When did you ever hear of any dump car or ash car having anything to do or in position that it might have anything to do with this accident? A. I have never connected a dump car with the accident.

Q. You have talked to Mr. Hackbert when he started to try this case, haven't you? A. Generally, yes.

Q. You were on the job when we went down to take the pictures and make the measurements in the yard?

A. I met you, yes, sir.

Q. And you were there? A. Yes, sir.

Mr. Ryan: I think that is all.

The Court: Any redirect?

Mr. Hackbert: No redirect.

The Court: That is all. You may step down.

Mr. Hackbert: That is all, if your Honor please.

(Witness excused.)

The Court: The defendant rests.

(And Thereupon the Defendant Rested Its Case.)

263 The Court: Rebuttal, if any, by the plaintiff?

Mr. Ryan: Your Honor, will you allow me to confer with Mr. Miller just a minute?

The Court: Yes. We will take the afternoon recess at this time. We will recess.

(A recess was taken.)

(The following proceedings were had out of the hearing and presence of the jury.)

The Court: Are you going to rest the plaintiff's case?

Mr. Ryan: Yes, your Honor. We are through. The only thing we are trying to get these instructions ready.

The Court: You can do that after we finish for the afternoon. I will wait until you have them laid out, and before we bring the jury in. We will bring the jury in, and then you can rest and then send them right out again. You do not want to start the argument this afternoon?

Mr. Ryan: I don't think so.

The Court: Bring the jury in and the plaintiff will rest then, and we will get on with the rest of it.

(The following proceedings were had in the presence and hearing of the jury.)

264 The Court: Rebuttal, if any, by the plaintiff?

Mr. Ryan: No, your Honor, we rest.

The Court: The plaintiff rests. Both sides rest. The jury may be excused for the afternoon, and be back in your places tomorrow morning at ten o'clock. The jury is excused for the rest of the afternoon.

(Which was all the evidence offered and received on the trial of the above-entitled case.)

265 (The following proceedings were had out of the hearing and presence of the jury.)

The Court: Answering your question, Mr. Ryan, all of the photographs will go at one time to the jury.

Defendant's proposed instructions have been handed up?

Mr. Hackbert: Yes.

The Court: You assemble yours and give them to the Clerk. You wait until we adjourn and then assemble them and give them to the Clerk.

How much time do you want tomorrow for argument?

Mr. Ryan: Your Honor wants to leave at what time?

The Court: Five-fifty.

Mr. Ryan: I would like to have an hour, your Honor.

The Court: That is reasonable, I think.

Mr. Ryan: I will make a fair opening.

The Court: You can distribute the time between the opening and closing as you see fit. Is that agreeable to you?

Mr. Hackbert: Satisfactory.

The Court: An hour for each side.

Mr. Ryan: Then we have one thing: I want to ask leave to amend the complaint here in a minor particular.

266 The Court: To conform to the proof?

Mr. Ryan: Yes.

The Court: Give a copy to defendant's counsel.

Mr. Hackbert: That amends. I have a motion directed to the separate allegations of negligence.

The Court: They would not hear that, anyway.

Mr. Hackbert: No. I want to know that they were out of the room.

The Court: Sure. They have been dismissed. They have gone home, but none of them are in the court room.

You have no objection to the filing of the amendment to the complaint at this time? It is an amendment to conform to the proof.

Mr. Hackbert: I have no objection to his making the amendment. I would want to raise some question about the sufficiency of his proof to support it.

The Court: Leave to file the amendment is granted. It may be filed instanter.

You have some motions?

Mr. Hackbert: I have, first of all, a motion for a directed verdict at the close of all the evidence which I assume there isn't any point in taking any time to argue it.

The Court: No. You just make the motion for the
267 record, and let the record show the same has been argued and is denied.

Mr. Ryan: I want to say this to your Honor, to simplify the amendments, I have decided to withdraw from the complaint—

The Court: Will you wait one minute until I catch up with the notes? I do not write shorthand. What does that amend, the one that you filed?

Mr. Hackbert: Sub-Paragraph C of Paragraph 6.

The Court: All right, then, we have a motion of the defendant for a directed verdict at the close of all the evidence, and is denied.

Mr. Hackbert: What I was going to file, and perhaps the orderly way would be for me to file it, and then for Mr. Ryan to make that change.

The Court: You are striking first. Maybe we won't have to have so many. The plaintiff then moves to strike?

Mr. Ryan: I will withdraw, your Honor, Sub-Paragraphs D and E of Paragraph 6.

The Court: You withdraw Sub-Paragraphs D and E of Paragraph 6?

Mr. Ryan: Yes.

The Court: Any others?

Mr. Ryan: No.

268 The Court: The same are withdrawn.

All right, what is your motion?

Mr. Hackbert: If your Honor please, my motion will go then just to Sub-Paragraphs A, B and Sub-Paragraph C, as it has been amended.

The Court: Your motion now, Defendant's motion is to strike?

Mr. Hackbert: Sub-Paragraphs A, B and Sub-Paragraph C, as amended.

The first, A, is that the defendant "Carelessly and negligently propelled and impacted two or more of the said cut of cars upon and against the cars projecting out on the west rip lead at the place aforesaid."

As I understand Jack O'Donnell's testimony today, he does not claim that there was anything unusual or at fault in the way in which those cars were brought to a stop. He says that he gave the signal for a violent stop and the engineer obeyed his signal. That is just the way he wanted it done. Is the negligence arising in connection with that incident solely as to the breaking of the coupling and not as to the manner in which the cars themselves, cut of cars were propelled?

The Court: As to (b)?

269 Mr. Hackbert: As to (b) I don't see that there is any causal connection between any question about the cars which were already standing on Number 5 rip track and which had not coupled as being a causal factor in this accident, whether the accident happened under the plaintiff's theory or under the defendant's theory, those cars had come to rest, and I don't see anything here that would justify the jury in finding that any of those six cars which were put into Track 5 prior to the time of this movement on which the coupler broke, that any of those cars did not comply with the Safety Compliance Act because Jack O'Donnell testifies

that the cars may or may not couple, depending upon whether the knuckles were open or closed, depending upon whether or not the draw bars are in alignment or not.

There is no showing here that those couplers of those six cars which were standing there, and between some of them I think there were two gaps in that string of six cars, there is no showing that those draw bars were exceptionally out of alignment or that the knuckles were open so that the cars could be coupled.

So I don't think there is any basis upon which it can be contended there is any violation of the Safety
270 Compliance Act. I understood it is those cars that Sub-Paragraph B is directed to.

Then the amendment of Sub-Paragraph (c) is that the defendant "carelessly and negligently failed to equip and maintain on one of the cars being moved along said track a safe and efficient coupler which would remain coupled to the car to which it was attached, but which, on the contrary, was so defective and insecure that it broke loose from said car, contrary to the provisions of the Federal Safety Appliance Act."

The Safety Appliance Act, insofar as couplers are concerned, does not require that you have couplers that will not break or will not separate. The language of the Safety Appliance Act is that the cars must be equipped with couplers that would couple automatically on impact or which can be coupled without the necessity of men going between the ends of the cars. In other words, the Safety Appliance Act does not say that you must have safe and efficient couplers on them, nor does it say that the coupler which is ineffective or defective is a violation of the Safety Appliance Act. A coupler violates the Safety Appliance Act only if it fails to couple automatically by impact, or if it can't be uncoupled
271 without men going between the ends of the cars. But a coupler on which the draw bar breaks in half is not within the purview of the Safety Appliance Act.

The Court: Defendant's motion to strike Sub-Paragraphs (a), (b) and (c) in Paragraph 6 of the Complaint, as amended, is denied.

Mr. Hackbert: Will it be necessary for me to file a written motion on that?

The Court: No. I think it is in the record.

Mr. Hackbert: The motion as it is here made?

The Court: The motion as made and denied.

Mr. Hackbert: The change which Mr. Ryan has made in his complaint will require me to re-write instruction 9 as I have tendered it.

The Court: Do you want to do it now? Then give it to the Clerk later. Mr. Ryan has assembled his, and after I adjourn why don't you stay here? Can you do it here at the desk this afternoon, or do you want to bring something in in the morning?

Mr. Hackbert: My instruction Number 9 is one that informs the jury what the allegations of negligence in the complaint are.

The Court: I will instruct the jury on the allegations of the complaint from the complaint as amended. So for the purpose of your record you can bring in
272 tomorrow morning a proposed instruction, if you care to. I will instruct the jury as to the allegations of the complaint from the complaint itself.

Mr. Hackbert: I will withdraw Instruction Number 3 which I have tendered, which relates to the safe place to work, inasmuch as Mr. Ryan has withdrawn that charge of negligence.

Mr. Ryan: These are your copies.

Mr. Hackbert: Yes.

The Court: Take three out.

Mr. Hackbert: I am withdrawing three. I will amend now.

The Court: Complete your copy for the Clerk's files, and then give me the carbon.

Mr. Ryan, you assemble yours as soon as we read this.

Mr. Ryan: And give you two copies?

The Court: Give me two copies and one carbon. The purpose of that is I file the originals with the Clerk. There is one record at all times as to what you requested, and I can use the others in any way I like.

Anything else before we adjourn?

Mr. Ryan: We went a little time here. Is the Bailiff closing up?

273 The Court: They will wait for you.

Mr. Hackbert: Shall we make our objections to the instructions before your Honor instructs the jury, or after?

The Court: According to the Rules of Civil Procedure, you make them after, out of the hearing of the jury. I will give you an opportunity in chambers before the jury retire.

We will recess at this time until ten o'clock tomorrow morning. One hour aside will be granted for argument.

Mr. Ryan: Will we be here at ten o'clock?

The Court: We will get started as early as we can. We will recess now until tomorrow morning at ten o'clock.

(Whereupon at 4:30 o'clock P. M. an adjournment was taken until Wednesday, October 1st, 1947, at 10:00 o'clock A. M.)

274 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

• • (Caption—No. 46 C 1493) • •

Before Campbell, J. & J.
Wednesday, October 1, 1947,
10 o'clock A. M.

Trial resumed pursuant to adjournment.

Present: Same as before.

(The following proceedings were had out of the presence and hearing of the jury.)

Mr. Ryan: If the Court please, I have one matter. I want to ask the discretion of the Court to permit me to ask Jack O'Donnell one question as to the number of the car that the coupler broke on, and the ownership of it. I should have introduced it in rebuttal. I asked
275 the claim agent and he didn't remember whose car it was, but he did say that Jack O'Donnell gave him the number of this car, and he has the record, and has the number on his record. It was 31426, an E.J. & E. car. If your Honor please, I want to ask the indulgence of the Court, to permit me to ask that one question.

The Court: Any objection?

Mr. Hackbert: Oh, I think not.

The Court: Possibly we could save time by stipulating at this time that if he were recalled he would so testify.

Mr. Ryan: Yes.

The Court: Wouldn't that save everybody's time?

Mr. Ryan: Yes.

The Court: All right, we will do that.

When the jury comes in, you can make that stipulation for the record.

Mr. Ryan: I am presenting a motion for a directed verdict for the plaintiff here at the conclusion of all the evidence.

The Court: Well, that as well as the defendant's motion will be taken under advisement until the return of the jury.

276 Mr. Hackbert: I think that is not quite an accurate statement of your motion. Isn't it a motion—

The Court: I haven't read it.

Mr. Hackbert: —that the court instruct the jury that the plaintiff was in interstate commerce and subject—

Mr. Ryan: I will withdraw that. That was not the motion.

The Court: You are now asking, at this time, for a directed verdict for the plaintiff?

Mr. Ryan: Yes.

The Court: That motion as well as the defendant's motion for a directed verdict are taken under advisement pursuant to the Rules of Civil Procedure, to be decided by the court after verdict.

Mr. Hackbert: I have a couple now. The amendment which Mr. Ryan made at the close of the case yesterday afternoon for the first time raised the contention in his complaint that this car violated the Safety Appliance Act because of the fact that the coupler broke. His previous allegation had been that the coupler on that car was one which would not couple automatically by impact, which comes specifically within the language of the Safety Appliance Act.

I would like leave to add what would be an 8th
277 defense, that the defendant denies that the Federal Safety Appliance Act applies to the movement referred to in subparagraph C of Paragraph 6 of Plaintiff's complaint as amended, and specifically denies that the coupler referred to in said subparagraph failed to comply with the Federal Safety Appliance Act.

The Court: Leave to file.

Mr. Hackbert: Then, if your Honor please, I re-wrote Instruction No. 9, which—

The Court: You can hand it up. Hand it up in duplicate.

Mr. Hackbert: That was an instruction of mine which referred to—

The Court: Very well.

Mr. Hackbert: —the allegations of negligence in the plaintiff's complaint, and his withdrawal of two of them, and the amendment of the third changed that.

In going over Mr. Ryan's tendered instructions last night—

The Court: We will not discuss the instructions. I will instruct the jury.

I have to leave at 12:30. You each have an hour for argument. You will each want to argue the instructions, and you will be here two hours doing that.

Mr. Hackbert: I do not want to argue with respect
278 to any of the separate instructions, but his instructions present two theories of his case, and I would like to know if I could at this time in general know how your Honor is going to rule on his instructions or how you are going to instruct the jury, so that I will know what questions are open to me to argue. He is asking your Honor to instruct as a matter of law that he was engaged in interstate—

The Court: I intend to so instruct the jury.

Mr. Hackbert: The other feature of the instructions is they embody his contention that a coupler which breaks in half, as this one did, violates the coupler provisions of the Federal Safety Appliance Act.

The Court: I intend to instruct the jury on the law as to the Federal Safety Appliance Act, and let them decide whether or not under my instructions on the law

such a breakage is a violation thereof. Let the jury decide the facts.

Mr. Ryan: I am prepared to cite cases that that is a violation.

The Court: I think you are sufficiently informed.

Mr. Hackbert: I am sufficiently informed, your Honor.

The Court: All right. Arrange the tables and bring in the jury.

279 (The following proceedings were had in the presence and hearing of the jury):

The Court: A final stipulation has been agreed upon between the parties, and plaintiff may reopen his rebuttal to read the stipulation so that the jury will hear it.

Mr. Ryan: Your Honor, I understand that it is stipulated that the plaintiff's witness, Jack O'Donnell, will testify that the car on which the coupler broke was Car No. 31426, and that it was an E.J. & E. car.

Is that correct?

Mr. Hackbert: That is correct.

Mr. Ryan: That is all, your Honor.

Which was all the evidence offered or received at the trial of the above-entitled case.

280 *Opening Argument by Mr. Ryan.*

The Court: You may proceed with the closing argument.

Mr. Ryan: May it please the Court, ladies and gentlemen: We have had a rather interesting session in this case, and it involved a good deal of proof, so far as your jurors, perhaps, are concerned. That is, to describe railroad tracks, switches, lead tracks and all of that takes some little time, and I think his Honor was very patient with us in permitting us to go into the detail we did. But I think before we got through, that you people understood just what movements were being made on the night in question, so far as they pertain to the accident.

You will recall that I did not go into the work these men did for several hours before they commenced the work on the tracks in question. I simply proved that they reported for work at four o'clock and did consid-

erable work up to the time that they moved their engine down onto track 2.

Now, I want to call your attention specifically to what we claim in the case, because counsel will have an opportunity to answer me and I will then in the meantime reserve a portion of my time to answer him. So I do
not wish to be in the position of not fully covering
281 every feature of my case.

You remember that I told you at the outset what the law was in the case, that these two statutes make the railroad company absolutely liable in this case if a coupler broke and if the movement of the cars that followed injured and killed the decedent, William O'Donnell.

Mr. Hackbert: I object to that statement of law to the jury, that the statutes make the railroad absolutely—

The Court: The jury will be governed by what the Court instructs them as to the law, and not what counsel says. I will instruct them on the law at the right time. That will make it unnecessary to interrupt the counsel any further.

You will take your instructions as to the law from the court.

Mr. Ryan: Mark you, the Court does not rule that I may not state the effect of the law as—

The Court: My ruling is clear.

Mr. Ryan: Well, I wish to repeat just what I said, that the law is definite and absolute, that if a coupler broke on a car causing a movement of cars that resulted in the death of the decedent while the railroad
282 is engaging in interstate commerce, the railroad is
absolutely liable, apart from any other question in the case, apart from any negligence on the part of the decedent, if he were guilty of any negligence, apart from any degree of proof that they might have offered as to the care or maintenance of the couplers. If they brought in a dozen witnesses to prove that they had inspected that car and that it was in a good state of repair the day before or the night before, and if they showed that they inspected it regularly, and that the coupler appeared to be all right, that would be no defense in this case. If the coupler broke and it caused

the accident and death, they are absolutely liable in this case.

The only question, ladies and gentlemen, for you to consider is whether the decedent, William O'Donnell, came to his death at the time that the cars stopped and the coupler broke. We have made the movements plain. We have made it clear just what these men were doing, and you know that the railroad was fully advised as to everything these men did there that night.

They had a long statement from Jack O'Donnell covering every feature of their work that would throw
283 any light on the subject. It was so long and involved that I did not wish to take the time of the Court to read it all to myself. It was closely typewritten, three pages or more, and they were fully advised in the premises, not only by Jack O'Donnell, but unquestionably by the head man and by the engineer and fireman, just what took place. There is no dispute in the evidence, ladies and gentlemen, as to how this accident happened. There is not a possibility that you could be misled as to what caused this death, is there?

Now, let us review the evidence, briefly.

It is undisputed that they were making cars up on track 5, that this is the track I have at my finger right here, where this train was made up to go to the terminal yard. There is no dispute but that they threw in a number of cars, somewhere between thirty and forty cars. There is no dispute that the track was stretched. We explained that they took that engine back in here and pushed a number of cars on the lead in the east end of the yard. There is no dispute that thirty-five or thirty-eight cars would occupy thirty-eight times forty or forty-five or fifty feet, is there? There is no dispute that the cars were all coupled together before the movement of
284 throwing in six cars—one, two, one and two or whatever order in which he testified they were put in.

So that after the track was stretched, you remember that Jack O'Donnell testified positively and unequivocally that their next work—he had the switch list, he still got it, and if there was any question about it, they could have asked him anything about it and demanded the production of the sheet, that he threw in, on three movements, six cars.

He stated that these six cars thrown in on these three separate movements did not couple automatically by impact in two instances, that there was room here. He did not say that there was room in the clear for six cars. He said there was room for six cars, and that when he finished that operation there were two cars, or at least a car and a half on the rip track proper and the other one over a switch about a half a car length, and next to that was a gap of a car length, or something like that, and another gap between the remaining cars of the solid phalanx of cars left stretched and standing on the track.

I hope and trust all you jurors understand the movements that were made up to that time. I endeavored to make that so plain that anybody could understand it so there could be no quibbling about it or dispute about it.

The last work that they did on track 5 were the three movements in question. There is no dispute about it. If the railroad wanted to contest that or question it, they had every opportunity to do it. They accepted Jack O'Donnell's word for that. He told them that in his statement. He swore to it in this court room. So, no one has any right, court or jury or anyone else, to question the accuracy of that evidence.

What followed? He said he went over onto number 2 track to tie onto 24, 26 or 28 cars, whatever number there may have been there, and as Bill O'Donnell, the decedent, walked over to number 2 track where he and the head man were standing, and asked what the next movements were going to be. Is there any dispute about that?

And at that time Jack O'Donnell saw the position of these cars and the openings, and, in addition to that, he told his brother that they had one other car to go in on number 5 track, which was the end car as they pulled out toward the west, and as it was pushed back easterly toward track number 5. And Bill O'Donnell said to Jack O'Donnell, "There are a couple of joints", meaning a couple of couplers that did not make.

So, of course, he had to go over and open the knuckles and see that the couplers were in position to couple. They did not couple when they were kicked in

there, and you remember that the evidence again is undisputed that the cars were in the position to couple. One of the couplers had to be opened, the drawbars had to be straight, and if they hadn't been defective in one essential or another, the three movements would have coupled the six cars to those standing on the track.

Did they couple? They did not. Was there an opening of a car length or approximately that, or half a car length, whatever it may be? It doesn't make the slightest difference. There were two openings there. You know, when these cars are pulled out on tracks, they were all straightened out. It is just nonsense to be talking about going around curves. There are no curves there at all. There isn't any curve that would ever require—I want to show you ladies and gentlemen that when they came off of track 2—here is track 2, where my finger is—that is a straight track where the track ends, but it is straight, and when they go out on
287 27 and come back in, there is not a suggestion of a curve that would put a drawbar out of line. But even if that were true, the Federal Safety Appliance Act requires the railroad to equip all cars, and whether engaging in one class of commerce or the other, the couplers and coupling appliance, to couple automatically by impact under any and all circumstances. They make no exception for curves. In other words, the law places the obligation upon every steam railway, whether engaged in interstate or in intrastate commerce, to have all their cars, whether local or interstate, coupled with couplers of the automatic type that may be coupled and uncoupled without the necessity of men going between the cars. That has been the law since 1904.

Now, ladies and gentlemen, it requires no stretch of the imagination to conclude that if there was not something wrong with one or two of the couplers on these six cars, they would have coupled automatically when they were kicked in there in the usual and customary fashion. But that is only one step.

I do not care whether there was anything wrong with these couplers, or not, or whether you have to so find. The fact of the matter is, they did not couple. There
288 was no other way to get them coupled except to open the knuckle, and the inference is irresistable, and the conclusion is inevitable that when Bill O'Donnell

said, "I have a couple of joints to open on that track," that he went over and was doing that very thing.

How could it be contended that that is not the time the man was run over and killed? Just think about it.

They bring a claim agent here, who testifies to everything that is entirely immaterial in this case, about what he did in the middle of the night, looking for blood on a car when they bring photographs in here, showing where this man was run over and killed, which corroborates our side of the case.

You wonder why I, perhaps, was not quite as courteous to that man as I should have been. It would just seem ridiculous that this railroad, with all of their employees, their yardmaster and crew, and anybody else who might be around there, did not offer any evidence to contradict one syllable that Jack O'Donnell told you in this case.

I think, ladies and gentlemen, that you would conclude that Jack O'Donnell is a rather intelligent
289 young man. I think his evidence was clear. I think he is an exceptional railroad employee, and much above the average in intelligence.

I regret, and so does he, that he made any exhibition of emotion here. It was involuntary on his part, I can assure you. It is one of those things, when I was leading him up to what he found, that in the nervous excitement of the court room, it just affected him that way. But we had no desire to appeal to your sympathy.

You all promised us you would not permit sympathy to influence your verdict, and I joined in that request, and I ask you now to forget about sympathy.

This lady, the wife of the decedent, went on the stand and was calm and cool and collected, and she is the one, perhaps, that should break down quicker than anybody else, and she did not. That has nothing to do with this lawsuit, ladies and gentlemen.

Let me go on. Immediately after Bill O'Donnell started to open the knuckles, they pulled the cars out and signalled them back, and on account of the atmospheric conditions the engineer or the head man was slow in getting the signal over to the engineer, but they
290 did get it over in time, didn't they? Whether Jack went into that detail when he gave the Claim Agent

the statement is immaterial entirely. He did transmit the signal, and he did stop the train before this accident happened, and had it not been for the breaking of the defective coupler, of course, Bill O'Donnell would not have been killed. Isn't that plain and obvious? Could he have been killed at any other time? You heard some suggestion here about another car being thrown in or placed there, and there is not a scintilla of evidence that any other car or any other movement could possibly have killed Bill O'Donnell. Isn't that right?

What happens? After this coupler broke loose, these cars were thrown forward violently at a speed of eight or ten miles an hour, and they banged into the cars ahead while Bill is in there opening a knuckle, and run him down and killed him right there and pushed his body forty-five feet, and coupled the cars together after he had the knuckles opened.

Isn't the conclusion irresistible that he was in between the cars and opening the knuckle, and before he got out, that that thing happened? Did he have the slightest warning or notice or intimation that anything like
291 that could in the God's world happen? He knew another car was coming down there. He knew another car was going to be set out here that was going to be ultimately put in at the end of that cut after they had distributed the 24 cars. But could any human being anticipate this?

I am just talking. It doesn't make any difference. It wouldn't make any difference if Bill deliberately walked in between those cars to open the knuckle, knowing that this car was moving down toward the end of the cars, and he got killed.

It wouldn't make any difference if that coupler broke.

There is not any defense, there is not any possibility of a defense, of a legitimate defense, to this lawsuit.

What did they say about it? Well, when Jack O'Donnell said he put twenty cars away, or twenty—I don't know how long it took, probably twenty minutes—after this last movement was made, they closed up the gap and Jack O'Donnell put twenty cars away, and then he had four cars that he explained what he did, and before he put away the four cars he walked down here—

May I see your pictures, Mr. Hackbert, please,
292 the pictures that go in evidence?

Now here, you will take these pictures to your

jury room, ladies and gentlemen. Here is number 5 switch, looking east. Here is number 5 track. You see this walkover here. Here is where the cars were. Jack O'Donnell walked down here with his lantern, and you see where the flood lights are here, and you can imagine, with some of those big cars hanging out over the tracks, two feet or more, that he went down there to simply see that the couplings had been made, and, of course, his brother was lying flat next to that rail there, and he never saw him and never dreamed or had any reason to believe at that time that he had been killed or injured. He went down and saw that the cars were coupled together, and he put his four cars away, placed the dump car on the lead. It was not to go in on that track, nothing more was to go in on that track.

When the car with the coupler broke loose, he examined it and tried to fix it so he could pull—it didn't belong in the train, but the coupler was broke, and he couldn't get it out.

So, now, is there any evidence that any movement was made in on that track except the movement
293 when the coupler broke? Of course, there was the last movement, and that is the time Bill D'Donnell came to his death. And what happened? He either came to his death or was badly hurt or injured, unconscious and lying there. It doesn't matter. That is what caused his death, even if there was a spark of life in him when they went around the horn and pulled the cars out and run some more over him again. That never killed him, and if it did, it would still be the broken coupler that was the proximate cause of his death.

Where is there any evidence, despite the suggestion here to becloud the issues, that some phantom car might have been kicked in there? Where is there any such proof in the record? Where is there any suggestion that that is a possibility, ladies and gentlemen? I want counsel to tell you.

I want you to look at these photographs and you can readily understand them by the legends on the back.

You can look at ours and you can look at theirs. It is a most extraordinary thing that at nine o'clock in the morning these tracks would be cleared of all the

rubbish and broken couplers and everything is re-
294 moved—

Mr. Hackbert: I object to that, if your Honor please. There is no evidence tending to support any such assertion on counsel's part.

The Court: Sustained. The jury will disregard counsel's argument.

Mr. Ryan: May I call attention to the testimony of the yardmaster that there were broken couplers and rubbish, or am I in error about that?

The Court: The ruling will stand, as I indicated, and so we will not have argument after the Court rules.

Mr. Ryan: I do not profess to be infallible, but I think I heard everything that is going on here in this court room. I think I know that at nine o'clock in the morning it would be a most unusual situation to have all the cars off these tracks.

Look at our pictures. We go out there with the permission of the Court to take pictures, so that we can enlighten the jury as to these tracks, and the measurements, and we take an engineer who makes an engineering drawing, and look at our pictures, look at the cars piled in there.

Be that as it may, it has nothing to do with what
295 we are talking about.

What did Mr. Cogswell say that affected the plaintiff's right to recover in this case? He went down and took pictures, and they are substantially the same as ours. I asked him if he attached any significance to the fact that the danger sign had been thrown flat toward the west rather than toward the east, and he said, "No."

I asked him further, "You don't know the position of it at the time of the accident, do you? You don't know the position of it at the time Jack O'Donnell, the assistant yardmaster, inspected the conditions?"

"No."

And they testified, or at least Jack O'Donnell did, and I do not wish to over-state it—I don't recall whether I asked the assistant yardmaster which way that sign was turned, but I think I did. But Jack O'Donnell testified positively that it was thrown toward the east. Again, an immaterial matter. What difference does it make if

the coupler broke and knocked the man down, which way the sign was facing? It was not up. They were not repairing cars on the track. That is a sign for block-
296 ing the track where men are working. It was down flat, and does it make any difference whether it was thrown to the east or to the west? Does it make any difference whether Bill O'Donnell caught his foot in it and was killed, or was knocked down by the coupler and before he could scramble away he was killed or rendered unconscious and finally run over later? Not a particle of difference.

Ladies and gentlemen, I want to finish my closing argument by suggesting this to you. We have proved that Bill O'Donnell was forty-five years of age in November of 1945, just a month or two before this accident. I proved by his brother—I did not go into it with the widow very much because I did not want to create any situation that might cause her to exhibit any emotion in the case—but I proved—and his Honor very kindly asked a question when I got through with her, as to when she last saw him when he was in good health. But that is demonstrated by the fact that he went to work. I proved he was sober, efficient, industrious, a careful employee, brought all his money home, and I showed you for a number of years what his earnings were.

$3,303.45 for 1941; $3,348.96 for 1942; $3,661.48
297 for 1943; $3,625.24 for 1944; and $3,336.81 for 1945.

Of course, these men take a day off here and there. They don't work every day. They need a little recreation and enjoyment, like we all do, and for the few days in January, not counting the holiday itself, up to the 9th, he earned $96.

He had virtually half of his lifetime, or more ahead. You know that men nowadays live and are active and are energetic long after they are seventy. This man had at least twenty-five years of service ahead of him. He was a qualified conductor. His earnings averaged approximately $3500 a year. If you multiply that by his reasonable expectancy, why, you have an aggregate of eighty or ninety thousand dollars—

Mr. Hackbert: I object to that, if your Honor please. The Court specifically held it is not—

Mr. Ryan: I object to the statement that the Court specifically held that. They held just to the contrary.

The Court: I will instruct the jury on the law at the right time.

Mr. Ryan: This man was forty-five years of age. He was working. If he never gained any advancement,
298 if he stayed a switchman even, not a conductor, he was earning on an average of $3500 a year. If he was promoted, which he could have been, to a yardmaster or something else, he could have earned once and a half that much, couldn't he? He could have quit that and done something else if he was as bright a man as his brother is.

Whom did he leave surviving? We are not asking anything for the older daughter, because she was twenty and she would be of age when she was twenty-one. But he had the boy, fifteen, going to school. We did not bring him. And you have the two youngsters, three children, seven and six, and fifteen.

This man brought all his money home. He devoted his life and his earnings to the support and maintenance of his family. That is pecuniary wealth, isn't it? Can you conceive of that man not being worth any more than up to the sum I stated for his death? This widow is but forty-three years of age. She is not so very well, as she told you. She hasn't been able to work. She has those children on her hands. She has lost her husband. Those children have lost their father. They are deprived of the pecuniary value of all of his earnings, not only until they become of age, but at any time
299 during their lives. Would they be entitled to a pecuniary benefit from the father and husband?

Ladies and gentlemen, I do not wish to make any suggestion to you that does not meet with your approval. We sued for eighty-five thousand dollars in this lawsuit. The law says that this widow and children are entitled to their full measure of damages. Their full measure of damages. It it not any mitigation of it because of any contributory negligence. That is out of the picture in this case. There is not a scintilla of evidence or a suggestion that Bill O'Donnell was negligent or that if he had been negligent it would affect the right of the widow and these children, in view of the Safety Appli-

ance violation, to recover the full amount of her damages in this case.

I want to hear what counsel has to say, and I will reserve the rest of my time to answer him.

I thank you.

300 Mr. Hackbert: If the Court please, ladies and gentlemen of the jury:

It is not an easy task to come here and ask that you send a widow and three children away from this court with no financial recompense for the death of a husband and father, and it is no easy task which the law imposes upon you ladies and gentlemen that you shall decide what are the questions in dispute so far as the facts of this case are concerned and to make your decision one way or the other upon those issues.

But the law says this, and you must be governed by the law, that Mrs. O'Donnell and the children are not entitled to anything from the railroad company unless they prove that his death was due to the fault of the railroad company. Unlike our state Workman's Compensation Acts, which have provided that when a man is killed when he is at work his widow and his dependents are entitled to be paid a sum of money irrespective of who was to blame for the accident, irrespective of what his fault may have been, so long as he was hurt while he was at work and the accident arose out of the course of his employment. That wise provision
301 of law has not been followed by Congress when it comes to employees of railroad companies, and we must take the law as Congress has laid it down, and you ladies and gentlemen have no right to substitute in your own minds a different theory of compensation for the one that the law provides.

The law says that Mrs. O'Donnell must prove that her husband was killed by the fault or negligence of the railroad company, and the law says that unless she proves that to your satisfaction she can receive nothing.

That is the law which all of us must follow, by which all of us are bound. And I think you cannot say that there is any criticism that attaches to the railroad company, if it honestly believes that this accident was not caused by its fault, in saying that it must follow the law and be bound by the law in this case, and they ask

that you ladies and gentlemen carry out the duties which your oaths as jurors compel you to carry out.

What are the facts of this accident? I told you in my opening statement that it was our contention that this injury to Mr. O'Donnell occurred not when these two cars broke off and ran onto Track 5, but on one
302 of the two subsequent movements which were made in that direction, one, when at the close of their night work they set a single car in on that track, or the other, that the fatal accident occurred at the time that all of these cars were pulled eastwardly out of Track 5 and taken around in the general train yard.

The only man who knows about this accident is Jack O'Donnell, and Jack says the one ash car or dump car that was put in on that track did not come in contact with the cars that were there. I will take his word for it, and we will turn then to the question in this case which I think is controlling, and that is this:

Was Bill O'Donnell struck and run over at the time the coupler broke and those cars ran in on that track, or was he killed and run over when he was attempting to ride out on that cut of cars as they were being pulled to the east and around the roundhouse to be taken down in the general train yard which, as Jack O'Donnell testifies, it was often Bill O'Donnell's habit to do? That is the question in this case, ladies and gentlemen.

Mr. Ryan brushes aside this last movement out
303 of Track 5, but I do not think it can be brushed aside quite that readily, and he says there is not any scintilla of evidence to show the man could have been injured in the course of that movement.

The question which you have to decide, one of the questions and perhaps the most important question, is this: Was it more likely that the accident occurred when the coupler broke and the two cars ran in there, or was it equally likely or more likely that he was run over in the course of the final movement out of Track 5?

The law imposes another burden on Mrs. O'Donnell in this action. She must prove her case by the preponderance of the evidence. She must prove that it is more likely that the accident happened, as they contend, on this first movement. If the evidence is evenly balanced and in your own minds you are unable to say whether

it was the one or the other movement, then she has failed to prove her case and you must find against her.

I think Judge Campbell will tell you that in the final instructions, and of course if the evidence shows that it is more likely that he met his death in the course
304 the final movement out of Track 5, then since there is no contention that there was any blame which attaches to the railroad company in connection with that movement necessarily, if that is so, if that is what you believe, you must vote in favor of the railroad company, not guilty.

Mr. Ryan tells you—first of all, I want to talk a little bit about the first movement when the two cars broke off and ran into Track 5. He tells you that the Federal Safety Appliance Act imposes an absolute duty on the railroad company not to use cars where couplers may break in two. And upon my objection Judge Campbell said he would tell you what the law is.

Now, the specific language of the law is this: That the railroad company may not haul or use on its lines cars equipped with couplers which will not couple automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars.

The law does not say anything whatever about couplers which break, and I think after you hear Judge Campbell's instructions as to what the law is you will conclude that the requirements of the law, so far as a coupler breaking is concerned, is that the railroad
305 company must use ordinary and reasonable care. There is not a word of evidence here that there was anything about the condition of this coupler which could have caused anyone to believe that it was at all likely that it would break. So I say if that is the law you must necessarily find that there has been no proof here that the railroad company was negligent as concerns that coupler.

So far as the exact language of the statute, which I think Judge Campbell will tell you in his instructions, what the language is, there is not any doubt about the fact that upon this particular car, J-31421, or whatever the number was that was stated here this morning, that so far as that car is concerned it did couple automatically by impact when the engine tied into those cars on

Track 2 and pulled them out toward the west. There is not a word of evidence here, is there, that that car failed in any way to couple automatically by impact upon that movement or upon any other movement which this crew or any other crew made with that car.

Mr. Ryan: Your Honor, I won't interrupt again, but notwithstanding your Honor's ruling, I want to pro-
306 test against this argument, that breaking of a coupler is not—

The Court: You will have a chance to protest when you answer him. Go ahead with your argument.

Mr. Hackbert: There is no doubt about the fact, on the evidence in this record, that this car did couple automatically by impact. Could it be uncoupled without the necessity of men going between the ends of the cars?

I think Jack O'Donnell testified the way the cars can be uncoupled is to use this pin lifter on the outside of the car. That is to make it unnecessary for men to go in between the ends of the cars, either to adjust the knuckle or to lift up this pin which unlocks the couplers and permits them to separate.

There is not a word of evidence in this record of any attempt to uncouple that E.J. & E. car upon which the coupler broke, and that it could not uncouple without the necessity of a man going between the ends of the cars.

So far as that car is concerned, ladies and gentlemen, when you listen to Judge Campbell's instructions, listen and see if he doesn't tell you that this is the test
307 of a violation of the coupler provision of the Safety Appliance Act, and if that is what he tells you is the test, then necessarily you must find that this car met that test because in neither one of those respects is there a word of evidence here as to any failure of that car to function in the two respects that the statute requires.

So far as the negligence in causing this coupler to break, Jack says that he gave the signal to the engineer and the engineer stopped in response to the signal that he gave, that it was just exactly what he asked for and he doesn't attach any blame to the engineer for

the manner in which the stop was made.

308 There is his only admission as to what it was as to whether or not there was any negligence in the handling of that car as they were moving out towards Track 5. It might be regarded as more or less the fault on the part of the railroad company.

Jack says he does not blame the engineer. If he does not blame the engineer for the manner in which that pull was made and he is an experienced railroad man with thirty years experience in handling and switching cars, I say to you, Ladies and Gentlemen I will take his word for it that there isn't any blame to be attached to the engineer for the manner in which that car was handled and in the manner in which the stop was made.

Now, let us turn to the question as to the movement which is more likely. Jack O'Donnell is the only man who was in the vicinity where this accident happened. The testimony was this crew working there at night was the crew that did all the switching in this rip track yard. The car repair men worked only during the day. They were not there at night. Nowicki, the head man, was up here somewhere to the west between Jack O'Donnell and the engineer. The engineer and the fireman were, of course,

309 in the cab of the engine, some twenty cars, some thousand feet to the west. There isn't anything they know about this accident. Jack O'Donnell is the only man whose testimony as to what the circumstances were that night is of any value.

It is an unfortunate thing for Jack O'Donnell that he was this man's brother and that he must feel some of the responsibility. There must be some feeling in his mind there might have been something he could have done to have prevented this accident. Certainly it is one of the most unfortunate of experiences that could happen to any man, that he should be obliged to go to look for his brother and find him dead along the railroad track as Jack did.

We may expect that Jack O'Donnell in his testimony will give his sister-in-law and the children of his brother the benefit of every single inference that can be drawn favorable to their case from his testimony, but I will say this about Jack:

I know Jack a long time. I don't think that he would sit here on the witness stand and lie about the circum-

stances. I think, as I say, that he will give his sister-in-law the benefit of every possible inference that can be drawn in her favor. But I will take his testimony and
310 I will assume that it is true. And I say to you, Ladies and Gentlemen, that taking his testimony and giving it every benefit that you can that would help his sister-in-law's case, I say to you that his testimony shows not only that it was less likely that his brother's death occurred in the course of this first movement. I say to that his testimony proves almost beyond the shadow of a doubt that the time when Bill O'Donnell was run over was as they were pulling the cars out of Track 5 to the east.

That is the question, Ladies and Gentlemen, and I invite Mr. Ryan in his closing argument to tell you why it is more likely that the accident occurred in the first movement, rather than in the last movement. It is not a question as to whether or not the coupler broke or not. There isn't any dispute about that.

There isn't any dispute about where these cars were standing on these tracks. You take Jack O'Donnell's testimony for that just as it is. There isn't any dispute in that respect. The question is this, Ladies and Gentlemen: Which was the more likely movement that caused his death. You see there again the burden is upon her to prove that it was more likely movement that caused
311 his death. You see there again the burden is upon her to prove that it was more likely that it happened in the first movement.

What is the evidence that bears on that question? What is the circumstantial evidence here in this case? We may add the circumstances up. First of all, Jack and Bill O'Donnell were standing out here at Switch No. 1 as this cut of cars were pulling out of Track No. 2 towards the west. And Jack said to Bill, "I have got a car to shove into track No. 5. And then the balance are going to Track No. 1 and the set backs are going to Track No. 2."

Now, the evidence shows they were making up two strings of cars upon which the repairs had been completed, when down here on Track 5 are miscellaneous cars and when up here on Track No. 1 are gondollas. Jack said, "I got one car to put into Track 5. The balance go in No. 1. The set backs go in Track No. 2."

So there isn't any doubt about the fact that Bill O'Donnell knew that the next movement was going to go down here in the direction of Track No. 5. He is an experienced railroad switchman. He has been working continuously for the E. J. & E. Railroad for 21 or 22 years prior to the time of his death. He knew what was involved in
312 the movement that he had been told was going to come down in the direction of Track No. 5.

So, first of all we have the circumstance that you can't reasonably expect that a man of his years of experience as a railroad man is going to go down here on Track No. 5 and stand between the ends of the cars if he knows that there is going to be a movement made down there immediately, and thus put himself in a position of such obvious danger.

You can't assume that Bill O'Donnell was going to be foolish to go down there and stand in the center of the track into which he knew the very next movement was going to be made.

The second circumstance is this: Bill O'Donnell walked from Switch No. 1 down here towards Track No. 5 and I assume that he went down there. There isn't any reason but the fact he was going down there. While he was doing it this cut of cars had pulled out all the way. There is the difficulty at this switch. And you will remember that Jack O'Donnell testified it took some time to get through to the engineer his signal to stop that westward movement because the smoke blowing across these tracks somewhere out in that region would be off to the left of that
313 blue print.

Then they had trouble getting the movement started back again in the easterly direction. So it took several minutes certainly. Before this cut of cars came back moving towards the east and came off of the rip track lead there obviously was plenty of time for Bill O'Donnell to have walked the relatively short distance between Track No. 1 and Track No. 5 to the point where these couplings were that he wanted to look at, then to go about the rest of his business in connection with the activities of that period. What the rest of that business is is something I will come to a little bit later. There obviously was ample time for him to have gone and done every single thing he told Jack O'Donnell he was going down there for.

What is the third circumstance? That shows the proof that it wasn't in the course of that movement that Bill O'Donnell was struck and killed. While Jack O'Donnell is an experienced railroad man, we may reasonably assume that he was not unaware of the dangers to all railroad men in yard movements of this character and he knew precisely what happened. He knew that the coupler broke. He knew that the two cars ran down there
314 and came against the cars that were standing there in No. 5 Switch. He knew that those cars were moved in on Track 5. It closed up at least the first gap that was in there between the cut of three cars and the single car that was standing alone and with all his experience as a railroad man he testified here yesterday morning in response to my question that there wasn't anything about that that aroused any suspicion in his mind that there could have been any accident of any kind to Bill O'Donnell, his brother.

There is the judgment of an experienced railroad man. He knew the amount of time that had been involved. He knew the direction and the course of the movement. He knew precisely when the cars started. He knew precisely where. Bill O'Donnell was going down in the general vicinity of Track No. 5 and knowing all of those circumstances, it never occurred to him that even if there was the unexpected happening of the coupling breaking, that there was no possibility of any harm to his brother.

Now, I say with his experience as the foreman of that crew, his relationship to the man who was killed gives that judgment on his part there at that time that
315 night a peculiar significance, Ladies and Gentlemen.

And I think it is a very strong circumstance that indicates there wasn't anything to that happening which could have caused any accident to Bill O'Donnell.

The most conclusive thing is the thing that Mr. Ryan brushes aside so lightly and that is the fact that at the end or near the end of this series of movements, after the crew had put away all except four of the twenty odd cars that they were handling at this time and Jack O'Donnell walked down there to see if the couplings had been made on this string of cars that were standing on Track No. 5 and he began at the west end of those cars and he walked along the north side with his switchman's lantern in his hand, with the floodlight down in this part of the

yard on top of the coal chute focused up along these lead tracks in this area. And he walked back in along Track No. 5 for at least ten car lengths. And he threw the light of his lantern in at all of the couplers along that string of cars to see if they were united.

Now, if Bill O'Donnell had been killed in the course of that first movement or even as Mr. Ryan belatedly states now, if he had been rendered unconscious, his body
316 was there along the north rail right along where Jack O'Donnell walked.

Now, Jack O'Donnell with his lighted lantern is going along the north rail which is the rail across which the body was found, most of the body lying outside the rail. His arm, his right arm and his right leg over the rail.

There was no explanation of any kind on Jack O'Donnell's part as to how it was possible for him to walk right by his brother's body with a lighted lantern in his hand for his body apparently was there at that time. And I say to you Ladies and Gentlemen that is the most significant circumstance in this case. Without knowing where his brother was he walked right along there and if the body were there he couldn't help but have seen it. Certainly he gives you no conceivable excuse for not seeing him.

In the examination of Mr. Robertson, he talked about these floodlights. An effort was made to show that these cars cast a shadow to the north. Obviously, they had. If the floodlights were down here to the southeast and other cars standing along there, the body of the cars will
317 throw a shadow to the north. But, Ladies and Gentlemen, you have seen railroad cars. They do not come down and hug the ground the way modern automobiles do. The floor of the railroad car is three feet or more above the surface of the ground. Is there any conceivable reason under this circumstance, and was there any word of explanation from this witness stand, as to any possible reason why Jack O'Donnell couldn't have seen his brother's body there, if he was there at that time? And if he were struck in the course of the first movement, that body was necessarily there at that time when Jack O'Donnell walked by the place where his brother's body was later found.

Now, they come back and say, "Oh, well, it was in the middle of one of the cars. He did not look in the middle of the cars, of course."

His testimony was he looked at the couplings. But, take the testimony, Ladies and Gentlemen. These cars were standing up here. These three cars went beyond the switch of the rip track lead and went about over the switch and one extending into the—I am wrong, on the wrong track. I am on Track No. 5. They extended about a car and a half length beyond the switch. There was the space then of a car length, about a car length. Then
318 there was another car standing alone. Then, beyond that, there was what Jack described as a little gap.

Now, he was asked Monday afternoon, by Mr. Ryan, or no, the testimony was that when these two cars came in, between him and the three cars that were standing there, they closed up this gap of about a car length, this little gap, so that all the cars were coupled together, and that all told they moved the three cars that had been standing there, about a car length.

Jack was asked by Mr. Ryan on Monday afternoon, "How long is a car length? What is the average length of the car that you were handling that night?"

He said, "Forty-five feet."

Now, Jack O'Donnell measured and Art Coxwell measured the length of the fresh marks which showed the distance between the point of whatever car it was first struck Bill O'Donnell and the place where his body came to rest after being dragged and it was precisely forty-five feet.

Now, if Bill O'Donnell was standing inside the rails or was straddling the north rail of those tracks at a point opposite the coupling on the east end of the three
319 cars which were extending across Track No. 5 switch and the east end of that car, according to Jack O'Donnell's testimony, and I will take his word for it, was about opposite the stop sign where the marks began.

If that was when he was hit at that end of that car and that car was moved forty-five feet, as the testimony shows, those cars were moved a car length, when these two cars came in and collided, then, his body was dragged forty-five feet or just one car length and it would still be right at the coupler of that very car when Jack O'Don-

nell walked down along that track and looked at every one of those couplers for the first ten or more cars from the west end of that string. That is at least where he says, by his own admission, he looked. He looked at every one of them.

If Bill O'Donnell had been struck as they claim, and the cars moved a car length and his body was dragged a car length as the undisputed evidence here shows, in Jack O'Donnell's own figures, his own testimony as to the distance. Then, next, the body was dragged to the place where it would be lying between the two couplers, next when he threw the light of his lantern in there he
320 couldn't have escaped seeing him.

And if he was struck by the forward end of one of those cars and dragged by the forward end of one of those cars, his body would come to rest at the forward end of the car right where the couplers are and right where Jack O'Donnell was looking.

So, I say to you, Ladies and Gentlemen, that the most important fact in this case in determining whether the circumstantial evidence supports the plaintiff's theory is Jack's own admission that he walked along that walk and he looked in at everyone of the spaces between those cars and he did not see anybody, and that, Ladies and Gentlemen, is where the body must necessarily have been, whether the man was dead then, as Mr. Ryan now seeks to show, or was he merely unconscious.

I say to you, Ladies and Gentlemen, the circumstances show it could not have happened during the course of the first movement.

What is the other circumstance which tends to show that so very strongly? When Jack went back down to the yardmaster's office to make his report that they had completed their work for the night, he looked for Bill and Bill was not there. Where was the first place
321 that he went to look for him? He went to look at the east end of the yard to see if Bill O'Donnell had ridden out on that cut of cars that was being pulled out onto Track No. 5.

Now, that is when we say that in some way he fell from the car. Say the car started at the time that he was walking along there and in some manner or other caught him and pulled him under the wheels.

There is no suggestion of any circumstance in connection with that last movement of carelessness on the part of the railroad company. We don't know just how. We don't know just what circumstances might have caused him to fall from the car if he were trying to ride it, but the testimony is that he often did, and that is the first probability that occurred to Jack O'Donnell. With all of his thirty years of experience as a railroad man, the first probability that occurred to his mind was that his brother was riding out on that cut of cars.

He did not see him around on the east end. He went back to the yardmaster's office and Bill was not there. He asked if anybody had seen him, they said they hadn't.

So he went out again. This time, as I remember
322 the evidence, the cut of cars was pulled, completely pulled out of Track No. 5. He went where? Where was the next probability?

The next most probable place to find his brother is that he went out looking down along Track No. 1. Why? Because he had told Bill that after they set this one car in on Track No. 5 they were going to put the balance of the cars in on Track No. 1.

Bill O'Donnell had precisely the same purpose with respect to those cars standing on Track No. 1 as he had with respect to the cars standing on Track No. 5, to go along and make certain that the couplers were open, the knuckles were open, the drawbars were in line, so that when it came time to shove in there, just as when it came time to shove in Track No. 5 or pull out Track No. 5 to the other end, that all of the cars were coupled together and all of them would move as a single train.

That was the next series of duties he had after he went down here to Track No. 5 and then down on Track No. 1. I say to you Ladies and Gentlemen that Bill O'Donnell, or when Jack came down along Track No. 5 to look at these couplers that that is his real purpose.

That is what Jack, by his own testimony, indicated
323 it was his belief that Bill had gone back up there to Track No. 1. That was the next most probable place to look for him. He looked down at Track No. 5. He didn't find him. He went back.

I don't remember now whether he went back to the gate and waited for the engine to come back from the train yard where they had taken this cut of cars off of Track No. 5. But he still thought that the most probable place, the most probable thing that had happened to his brother was that he had ridden out with the cut of cars off of Track No. 5, which is precisely the time that we say that he was struck and run over.

That he found, when he talked to the engineer, that Bill O'Donnell had not ridden out to the train yard with the train. So he and the engineer started down and the most improbable place for the man to have been hurt, in Jack's experience and with his complete knowledge of every single move that happened to have been made that night, with his complete knowledge of duties of his brother who was one of the members of his crew, the last place to look, most improbable place, was along Track No. 5.

Jack went out and he walked down Track No. 1. He walked down all the way to the end of Track No. 1 and it wasn't until he had satisfied himself that Bill had not walked out to the switchman's shanty, that he had not ridden on the cut of cars, that he had not in some way been injured along Track No. 1, it wasn't until he had inspected every other possibility that had occurred to him that there was any likelihood of his having been hurt at the time these two cars broke away and ran into Track No. 5.

I say to you Ladies and Gentlemen when we are considering the probabilities, here is a man who had every reason in the world to make the story as strong against my side of the case as he can. He has every possible interest contrary to the interest of the railroad company. But his own experienced judgment, knowing every single circumstance that he did about the work of that crew and the movements that he made that night, that the crew made that night, was that the least likely place that the man had been injured was in the movement into Track No. 5, when the two cars broke away.

Now, Ladies and Gentlemen, I say, taking Jack O'Donnell's testimony one hundred per cent, that is his judgment. It coincides precisely with every other circumstance and fact in this case. The fact that Bill O'Donnell had plenty of time to walk down there

and look over these couplings before the delayed movement came along.

The fact he was an experienced man and knew better than to get out between the rails when a movement was impending into that track, the fact that Jack O'Donnell walked down along there and didn't find him and necessarily must have found his body there if he had been hurt or killed. The fact that when Jack O'Donnell finally realized, after talking to the engineer, when the engine got back to the gate, you remember that is the time when he broke down on the witness stand and you can't blame him for it, that is the time when he first realized that something must have happened to his brother. And where was the last place he looked? Where was the least probable place of injury? It was the movement that Mr. Ryan now tells you there isn't a scintilla of evidence to disprove.

I say to you, Ladies and Gentlemen, the evidence in this case points unmistakably to the fact that this accident occurred in the course of that last movement into Track No. 5. If you believe that, if you believe that the matter is uncertain, that you can't say honestly
326 in your own minds, one way or the other, in either one of those events, you must find that the plaintiff has not proved her case here and you must find the railroad not guilty.

I think I should touch just very briefly on the question of damages which Mr. Ryan must show presently in his closing argument. Obviously, the financial loss to a widow and children is not arrived at by taking the earnings for his most productive years. All of us know that the last four or five years, the war years, is the time when wages have been the highest and the testimony showed that when I went back one year beyond that which Mr. Ryan questioned Mrs. O'Donnell, that his wages for that year were some seven or eight hundred dollars less than what he was making in the later years.

So I say to you, first of all, you can't take the best year and consequently you can't say that the measure of damages if the average annual earnings multiplied by the number of years which it might be expected he still had ahead of him as a working man on a railroad because no man is ever able to bring home to his wife in a single lump sum the aggregate of all his earnings for the next twenty-five years.

327 The strict application of test of pecuniary loss to the widow and children is not governed at all by what the total of his average earnings are.

I submit to you Ladies and Gentlemen the fair test, if you should come to the question of damages in this case, and I do not see how you can, honestly, under the evidence and under your oath as jurors. Weighing this evidence impartially, if you do come to the question of damages, I submit to you that the fair test is this: Mr. Ryan will suggest some others, I have no doubt, but I submit to you it is a fair test.

A railroad switchman earning in the twenty-five years of his life between thirty-three hundred and thirty-six hundred dollars a year, what might he be able to provide for his widow and his children in the event he had met an untimely and early death? I say that basis is nothing like the figures that Mr. Ryan will submit to you.

I submit to you, Ladies and Gentlemen, that if you come to that question, as you deliberate in your jury room, that that is a very fair standard to bear in mind in determining what the amount of damages should be in this case, if you reach that question. But I say
328 to you, Ladies and Gentleman, your oath as jurors is to weigh the testimony in this case impartially.

We do not have any question here of believing or not believing any witness who testified from the witness stand. There isn't any question here that any witness has testified falsely.

I say, take the undisputed circumstances, line them up one after the other, and determine from those circumstances in which of these two movements did this accident occur. And I say to you, if those circumstances show beyond the shadow of a doubt that it certainly was equally as likely that it was the final movement into Track No. 5 which led to the death. I think it goes farther. I think it shows it was more likely that the least probable place for this fatal injury to have occurred, the least probable movement to have caused it, just as Jack O'Donnell's own actions that night show, it was the movement when the two cars broke away and ran into Track No. 5.

It does not do any good in weighing those circumstances to stand here and talk about an absolute duty of the railroad company with respect to the condition of its coupler. That is not the question here.

329 The question here is, which movement was it that caused Bill O'Donnell's death?

I say to you Ladies and Gentlemen, and I think when you deliberate in your jury room you must agree with me, that it was equally true that it happened in the final movement.

I think you ought to go so far as to agree with me it was more likely that it did happen in that movement.

If that is your conviction and if that is what you believe the evidence and the circumstances in this case show, then your duty as jurors is to return a verdict of not guilty. And you have no more right to allow sympathy and feeling to compromise the matter or to enter into your deliberations to return a verdict against the railroad company, if you feel as I do about the case and you can't bring any verdict in favor of the plaintiff any more than you can go over and put your hand in the railroad company's till and take money out and hand it to her.

Your duty, Ladies and Gentlemen, is to be fair and honest and weigh the circumstances impartially.

I say to you, when you get to the jury room, line these circumstances up, one after another, and see
330 if they do not agree, just as I have said, that Mrs. O'Donnell has failed to prove that it was most likely that this first movement caused her husband's death.

The Court: We will take a ten minute recess.

(Recess was taken)

331 Mr. Ryan Shall I proceed, your Honor?

The Court: You may proceed. You have 29 minutes.

## CLOSING ARGUMENT ON BEHALF OF THE PLAINTIFF BY MR. RYAN.

May it please your Honor, ladies and gentlemen of the jury: I shall endeavor to answer some of counsel's suggestions. I want to say at the outset that it is most astounding, the argument that counsel made and advanced in this case, and with such plausibility that I was almost convinced myself when hearing his plausible tones and his tender telling about how this happened that I thought there might be some question as to where Bill O'Donnell came to his death.

Then I turned to his opening statement when he told the jury and vouched for this fact and said: He said after the six cars were thrown in there and the last movement was made, he said then one of the cars in the remaining string of cars was also put back in on Track No. 5. Did you hear any evidence on that?

On the very next page he said to you again, "Our contention on the other hand is that the man was killed during one of the other two movements on Track 332 No. 5." Was it the movement when the single car went in there or the movement a little while later when they pulled all the cars that were standing on Track 5 out of there? Do you remember that, ladies and gentlemen? Did counsel vouch for his theory that there were two movements after the one we proved that killed this man? He said they put another car in there. Was he in good faith when he told you that? Did he have any evidence to back up his assertion? Did he attempt to prove it by the crew I just want to call your attention to that fact at this time.

The next thing is that there is nothing so misleading, ladies and gentlemen, as a half statement of the fact or a distorted statement, whether intentional or otherwise. You can put your finger on that which you know is untrue and point out the error in it. But if you mix that which is partly true with that which is partly false you can make a very misleading argument and reach a very erroneous conclusion.

Now, do you remember the great length of time he spent telling you why it would take so much time for Bill O'Donnell to come back and open the knuckles; that it took so long for him to get those twenty cars 333 up there?

Don't you remember that Jack O'Donnell told you that Bill O'Donnell stood right there with them and Novicki, the head man. All of these 24 cars were pulled out past No. 1 switch. It was then that he started to walk back towards No. 5 to make his couplers. Do you remember that?

Where is Mr. Novicki, if that is not true? Did counsel know? Did his claim agent know, or did his engineer and fireman know that there was no other car put on that track? Did you hear anything from these men?

How did it impress you to bring in a claim agent here and tell you that he is going to look for blood on car wheels? Does that make the slightest difference to you or to this case?

I want to answer the first proposition. He says that we must prove by a preponderance of the evidence that the first movement when the coupler broke, killed Jack O'Donnell. I say you must conclude from the evidence that that was the time he was run over and injured, not necessarily killed. I don't know whether they ran over him again when they pulled the cars out from the east end.

Let me say to you ladies and gentlemen, when
334 Jack O'Donnell walked over with his lantern, you can see the difficulty if you look at these pictures. You know that the car comes out two feet maybe over the tracks and that a body laying partly over the rail with his face down on the rail and his arms on the side is in the shadow of that car, and it never dawned on Jack O'Donnell that he was there, and that he certainly was looking to see that the couplings were made on these cars. If Bill O'Donnell was not killed at that time, where was he? Where in the name of Heaven could he have been then? What did he have to do after that? Did anybody ever see him again? Nobody ever saw him again.

As I say to you ladies and gentlemen, the conclusion is inevitable. There isn't any other conclusion but that he was run over when the coupler broke, because he was never seen alive again. And whether, as I said, whether he was pushed a car length, or a car and a half length, how could anybody with mathematical certainty tell you just where the body was going to be after it had been pushed west of it? Or what struggle did he make when he was first hit to regain his feet? Does anybody know? Does anybody know what part of the car ran over him?

Jack O'Donnell told you that when these cars hit,
335 whether they were moved a car length or two car lengths forward when the coupler broke, without coupling it, they followed up that move. How could he tell you that he would be at the front end or right between the couplers? Why would he go to look for

him when the wheels passed over this body, his limbs, and he is crushed down there in the shadow of the car, underneath the side of the car, a couple of feet? Do you suppose that anybody thought at that moment that he had been killed?

Jack was looking to see that the cars were coupled up so that he could go on with the cars. Was there any question about that? Is there any dispute about it? And where, if he was not under the cars, where could he have been?

Now, the undisputed evidence is that after this movement and the knuckle broke and the cars were impacted ahead, they went on and distributed twenty of the cars. Then that was the time before moving the other four cars that he went down to see that the cars were coupled together. And he walked down in this space. He walked down in this space here, and with cars overlapping the track, shading the dark ground at night time, with the shadow of the car overhanging, of course he didn't see it. He was crushed, of course, and lying there, un-
336 questionably, and killed on the first movement.

He wants you to guess and conjecture that Bill O'Donnell waited. Remember now, from that time on they had put away these 24 cars and one dump car, and that took a half an hour, didn't it? He wants you to believe that Bill O'Donnell stayed around there out of sight; that he crawled under a box car where nobody could see him, or hid himself and waited until they pulled out from the other end, and then got in between the car. For what purpose? What in the name of common sense or reason would he go in between the cars at that time when the cars were already coupled. The only reason he would go in there was because their couplers were defective and did not couple in the first instance on that track. And the conclusion falls, necessarily falls.

I say to you that the only way this accident could happen was when he was in the middle of that track opening a knuckle, or perhaps with his foot over, or as these men put it, opening these knuckles when they did not open efficiently or do not operate with the pin lifter, and they have to go in there and open it.

Here is another thing. He mis-quoted the evi-
337 dence. I don't say deliberately. Now, I am not making any charges. Jack O'Donnell told his brother Bill that he was going to set a car out, which would be pushed into No. 5 after he got through with the other. He had gotten through with the disposing of the 24 cars. Do you remember that? He said, "I told Bill I had this car that I am going to set out on that track. It is to be pushed in later." And the proof is that Bill, if there was any charge to be made or any purpose in charging him with negligence, which, of course is not in the case, and you listen to the Court's instructions and see who told you the truth about the law in this case, would there be any purpose in God's world in his going in between the cars a half an hour later, and where was he all that time?

Why, he told you that they had been walking down there; that they some times walked down to the east end because when the train was coming they took it over to the terminal. Some times they rode down on the cars or engine, or some times they rode upon the engine, around the horn, and some times he walked down.

Well, he was not concerned at that particular time. And another little misleading proposition. He tells you that it never dawned on him that he should go and
338 look for him or that he knew. Of course, Jack O'Donnell didn't know that his brother had been killed, and naturally thought that he was doing something else down there. But when they came back the first thing he did was to tell the engineer to walk down that track. And the engineer did walk down there and told him he didn't see anything. He didn't walk far enough.

He has forgotten that Jack O'Donnell did surmise that something may have happened to him at that time and asked the engineer to go down, but they don't bring the engineer down here to tell you that he didn't go far enough when he walked down there to find Jack's body. He didn't mention that to you, did he? Suppose Jack O'Donnell did not guess right. What has his mental processes to do with this lawsuit?

He talks about the bu 'en of proof, and proving this case by a preponderance o/ the evidence. We accept that.

Why, ladies and gentlemen, the physical facts in this case prove definitely and certainly by every evidence that this man was killed when the coupling broke. Doesn't it? Could it by any possibility have happened at any other time?

Do you think this experienced railroad man with a wife and family like he had would walk in between
339 two cars in the middle of a track when the train was about to start out from the other end and get himself run over and killed? Isn't that nonsense? Isn't that the worst kind of tommy-rot?

We can prove our case by circumstantial evidence, and make a stronger case than a lot of positive evidence. Why, circumstantial evidence is some times the best evidence in the world. You can get a conviction of murder on circumstances.

Witnesses some times deliberately testify falsely. Some times they are mistaken, and some times they tell half truths, but when you have physical facts that show this man was alive and well and healthy in the presence of two of their employes, Jack O'Donnell and Novicki, and he said, "I am going over to close up the knuckles on these cars"; and within a very few minutes, the very time that it took his train to pull out that distance and move five or ten miles an hour, a coupler breaks. A coupler breaks, and there is a crash. Cars were impacted with violence against each other. They are pushed forward and the gaps are closed up. They are immediately closel. They have been closed in a single movement. So if you were in there after that, and before you got back and you find the man's body where he is cut in two in between the cars,
340 why you could get a conviction for murder on such evidence as that.

Why do you suppose there was this camouflage talk at the outset about another car that was put in there? What was that for? They knew it was not true. It shows definitely whether there is good faith in this defense or not. Why did counsel tell you that there was another car put in there when he knew he had no evidence to that effect? And when he knew he couldn't prove it? When he knew he couldn't bring one of his employes to contradict anything Jack O'Donnell said in this case? What was the purpose of that? And now

he ask you, ladies and gentlemen, to guess or say that Bill O'Donnell for some mysterious reason disappeared. Nobody knows where he went or what he was doing, but he waits a half an hour where nobody ever sees him and then crawls in between the cars where he is going to get run over and killed. If that is not an insult to your intelligence, I don't know what it is.

Counsel does not hesitate to tell you that a coupler that broke loose is not a safety appliance violation. In other words, he tells you that the law imposes an absolute obligation upon the railroad to have all of the
341 cars equipped with couplers that will couple up and automatically by impact and uncouple without the necessity of men going between the cars. What was the purpose of that legislation? What did Congress in its wisdom pass these safety appliance statutes for? To protect this man in a dangerous and hazardous occupation. Railroad work at best is a hazardous occupation.

He is talking about a compensation case. What is that? That is mere sophistry, this talking about the State Compensation Act. We have nothing to do with that, and merely means that the State Compensation Act awards an amount to a widow or an injured person when there is no negligence, but Congress has placed the burden upon the railroads to pay these men or their families, if they are killed, because of a violation of that statute, not any limited amount as under the State Statute, but the full amount of damages which can be proved in the case.

Now, wouldn't it be most ridiculous if the Act requires them to have absolutely safe handholds and steel straps and all that sort of thing, all these safety appli-
ances, couplers that will couple automatically with-
342 out the necessity of men going between the cars and have these cars equipped with these safe appliances and then say you have to comply with that statute. You can't turn out an old coupler. Why, they might be cracked or broken, and if it couples without the necessity of men going between the cars, then the obligation of the railroad ends. Why, the absurdity of that is apparent to you. I don't have to waste time discussing it.

Why, of course, the books are abounding with cases where a coupler breaks and renders the railroad company liable because of its defect. Why, that is fine. The Act was originally passed for the benefit of the men who couple or uncouple cars and the principle has been liberalized and extended to passengers on a train and workmen in other parts of the yard. It applies to everybody that was injured as the result of a broken coupler because those things have to be safe. The law says they have to operate efficiently and serve their purpose, not only to couple, but to remain coupled. And yet counsel stands here for fifteen minutes, telling you what the law is. Surely this railroad lawyer knows better than that.

Ladies and gentlemen, I wish I had time to answer all of this. Counsel gave you some idea. He says the
343 Act says nothing about a coupler breaking, the Safety Appliance Act. Jack is the only man who knows anything about it. I made a note as I went along. Jack wasn't the only man who knew anything about it. The engineer knows whether he got a washout signal or not and had to stop. The engineer could tell you if he had difficulty getting the signals.

Why, Jack O'Donnell told you ladies and gentlemen the God's truth on the witness stand. He told his claim agent the truth. He told them everything about this case, and they have not a scintilla of evidence to contradict the physical facts and circumstances that the last time Bill O'Donnell was seen alive he was seen after the train passed him about there, and it would take a few minutes to come that distance. It would take a few minutes. He might have had trouble to open a knuckle in every one of those places. They did not function properly, or they would have been coupled in the first instance. Bill O'Donnell did not expect that one car was coming in there at that time. He was told something to the contrary, and it was not intended to be put in there at that time, much less kicked in, and no other car was ever put in there. That car was
344 to be pushed in and left down there, but they came back at a speed that when the signal was given, when the engineer made his stop the coupler broke, and Jack O'Donnell, as he told you, thought he could fix it so that he could pull that car out that did not belong

in there, but no other car ever went near there. So there is no other one, unless you believe from these facts and circumstances that Bill O'Donnell, whose life was just as near and dear to him as any of us in this courtroom, deliberately walked in between these cars at a time when he knew they were going to start from the east end, and took his own life. Could you say that the railroad is not liable in this case?

He said, "I invite Mr. Ryan to tell you why this is more reasonable. He invites me to tell you why it is more reasonable that he got killed when a coupler broke. You haven't in law, in fact, or in common sense, reason and decency a single outstanding fact which is sufficient as a proximate cause to cause this man's death, but the breaking of a coupler, contrary to law, which makes this railroad company absolutely liable. You have cars impacted against each other. You have the gaps filled. You have the man's body pushed along between the
345 tracks. What more do you want?

Reason? I don't have to give you specious reasons why he was killed then. I claim the physical facts as I stated in my opening statement. They lead to but what conclusion? That, of course, Bill O'Donnell was killed when that coupler broke, and these cars were impacted together and they ran over him while he was closing one of the knuckles. He was never seen afterwards. And this fantastic suggestion that he walked in there, why, what nonsense to claim he walked in there and got killed when they started, ladies and gentlemen!

Counsel has not told you, and he has not given you any evidence. He tries to tell you that if the cars, if his body is pushed 45 feet, then he will be at the front of the car, and right where Jack flashed his lantern to look at the couplers. He wasn't looking around the edges of the car at that time, of course. What nonsense it is to claim that. How can anybody with mathematical certainty figure out what is going to happen when cars smash into each other? This man wasn't telling you that the cars were moved except one place, two cars, two cars and a half. He was not trying to tell you.
346 They were banged in with considerable violence, at a speed of 8 or 10 miles an hour. They moved those cars in a flash and they coupled up the gaps, whatever it

was, one car length, and another opening of a few feet, and what have you? You have a man's life snapped out, but I can't conceive of his being knocked down. It is possible that he might have tried to scramble out of there and got as far as the track and fell and was rendered unconscious, and the movement at the east end, finally a half hour later killed him. But it is very unreasonable. It does not make the slightest difference, does it? He had no business in there. He never did go in there. There is nothing to that at all.

Just one or two little things, ladies and gentlemen, and I am through. How much time is there left?

The Court: Four minutes.

Mr. Ryan: Ladies and gentlemen, I tried to tell you what I thought the case was worth. I do not ask for sympathy. I want you to decide this case just the same as you would between two corporations. Suppose this was another corporation suing the railroad, the E.J.&E. Railroad, and suppose they had a valuable piece of 347 property which was worth as much as a human being who was earning thirty-six or thirty-five hundred dollars a year on an average, and who had an expectation of thirty or forty years of value to his wife and family. Suppose they were suing for that here, and the law placed the absolute duty on the E.J.&E. to equip their cars with safe couplers and this happened? And suppose the Court told you that if this man was in between the cars adjusting a knuckle and that a coupler broke, and he was run down and killed, and that you had an absolute case under the law, would you find for the railroad that was suing the E.J.&E.? Would you give that railroad anything less than the full share of damages?

What is there the full share of damages? You all promised me, every one of you, when asked the questions in the case that if you got to that you would award a sum that would fully, fairly and adequately compensate the plaintiff for his loss.

How much money would it take invested at 3 per cent interest? About the highest safe investment that you can make on money today, if you took this man's earnings and put them out at the high interest rate. The

man would be earning $600 or $700.00 more today.
348 Figure it up for the year, and the pecuniary service to his family. The pecuniary value is something more than mere dollars and cents. Waiting on a sick or injured member of the family, guiding him in his environment is pecuniary worth. What is a father and husband worth to this widow and children?

Ladies and gentlemen, before you cut the amount that we have sued for damages here, you, in your wisdom, are going to do as you think is right, fair and just. Don't do this family a great injustice by giving them much less than we have sued for in this case. I say you can sit in cases a thousand years, and yet you will never find a case so thoroughly proved as this one. I thank you.

349 THE COURT'S CHARGE TO THE JURY.

By the Court:

Ladies and gentlemen, it now becomes the duty of the Court to instruct you in the law in the case wherein you have just heard the evidence and the arguments of counsel.

Before commencing my instructions I would like to remind you that, as I know, some of you have sat in other cases in this district during their last month while you have been on this jury term, and in some of them you have probably sat on other personal injury cases, and so forth, and have probably heard instructions there. I want you to pay particular attention to the instructions here because this is the type of suit that is based upon a particular law regulating this type of suit, and the instructions you may have heard in other courts in this district during the last month, concerning personal injury cases and death cases, is not to guide you in this case. I want you to pay particular attention to the instructions in this particular case and be guided by these instructions in coming to your conclusion in this particular case.

Also, as I guess you have been informed, in order that you may be comfortable during my instruc-
350 tions, which I will try not to make too lengthy, your luncheon is to be served to you in your jury room. So do not be upset if I should go a few minutes over. They can't call time on me as I can on them.

This is a suit wherein Sarah O'Donnell, whom you have seen on the witness stand, administratrix of the estate of William O'Donnell, deceased, is the plaintiff, and the Elgin, Joliet and the Eastern Railway Company, a corporation, is the defendant.

The suit was started in this court by a complaint filed by the plaintiff, wherein, among other things, the plaintiff alleges that on January 9th, 1946, the defendant corporation was the owner and operator of a common carrier in the State of Indiana and elsewhere, and that the defendant admits.

Furthermore, at that time and place there was in existence the Federal Employers' Liability Act, which I will tell you about a little more later on.

The plaintiff further alleges that on the date, as aforesaid, January 9th, 1946, her husband, the decedent, William O'Donnell, was employed by and was at work for the defendant in Lake County, Indiana, as a brakeman; that part or all of his duties were the further-
351 ance of interstate and foreign commerce; that while he was so engaged the accident happened which resulted in his death; that at that time and place there was in effect an act called the Federal Employers' Liability Act which she previously refers to in her complaint and also the Federal Safety Appliance Act. Both of those I will instruct you a little later on.

She further alleges in her complaint that at the time and place I have referred to you her decedent was engaged in switching cars in a yard belonging to the defendant company known as Kirk Yard. He was acting as field man in the switching crew; that that crew and others of the defendant's employes had propelled certain cars on to a track in said yard known as Number 5 rip track and filled the track; that certain other cars intended to be placed thereon protruded out on to a certain lead track known as the west rip lead.

Plaintiff further states it was the duty of the plaintiff's decedent to open a knuckle in one of the cars which failed to couple so that all of the cars standing on Number 5 rip track could be coupled together and moved therefrom.

She states that the decedent proceeded to a point
352 where the cars were separated and attempted to adjust the coupling apparatus; that which he was

attempting to do so, and was between the cars in a position of danger the crew of which he was a member, pursuant to the order and direction of the foreman or conductor of that particular crew, propelled a certain cut of cars in a general southeasterly direction towards and approaching Number 5 rip track; that the conductor in charge of said movement signalled the engineer to bring the cut of cars to a stop before reaching the cars projecting out on the west rip track lead from Number 5 track.

She now alleges—this I want you to pay particular attention to—at that time and place while those things were occurring the defendant committed one or more of the following three acts of negligence. These are the three acts of negligence that she charges the defendant with:

First, the defendant carelessly and negligently propelled and impacted two or more of the said cut of cars upon and against the cars projecting out on the west rip lead at the place aforesaid.

Second, the negligence which she charges is that the defendant carelessly and negligently failed to equip and maintain on the cars standing on Number 5 rip track,
353 couplers which would couple automatically by impact without the necessity of men going between the ends of cars, contrary to the provisions of the Safety Appliance Act.

And the third act of negligence which she charges is that the defendant carelessly and negligently failed to equip and maintain on one of the cars being moved along the west rip track a safe and efficient coupler which would remain coupled to the car to which it was attached, but which on the contrary was so defective and insecure that it broke loose from said car contrary to the provisions of the Federal Safety Appliance Act.

In other words, the first act of negligence charged is general negligence in the propelling and impacting of two of these cars against the line of cars on Track Number 5.

The next two charge specific acts in violation of the Federal Safety Appliance Act. As a direct and proximate result of these acts, or some one of them, the plaintiff then alleges that when the moving cut of cars

was brought to a stop the couplers between the second and third cars broke, and the two leading cars of said cut were violently impacted against the cars standing on Number 5 rip track and projecting out on to the
354 west rip lead aforesaid; and as a direct and proximate result of one or more acts of negligence which I have just given you, and in consequence of it the cars were caused to run violently upon and over the plaintiff's decedent, which caused injuries which resulted in his death at that time, January 9th, 1946.

Plaintiff further alleges that the decedent left him surviving herself, his wife, Elizabeth and Marlene, his daughters, and William and Richard, his sons, who are living, as you have heard in the testimony here, and in the statements of counsel the oldest of the children is not claiming to be a dependent, but the other three are.

As the result of these things she further alleges that she has proper letters of administration granted by the Probate Court of Lake County Indiana, and so she brings this suit as administratrix, and as the result of the negligence charged and the other allegations in the complaint she asks for damages.

Now, to that complaint the defendant railroad company has filed an answer which insofar as you are concerned with it is as follows:

They admit certain of the allegations concerning
355 the fact that the deceased was in their employ; that they are a railroad; that they own the railroad yard and certain of the other formal allegations they admit, and denies various others.

The defendant specifically in the third defense alleges that the death of plaintiff's decedent was caused solely and proximately by the negligence of the plaintiff's decedent.

The third defense on the second page, I believe, is a typographical error.

Mr. Hackbert: It is, your Honor.

The Court: You may make an amendment to your answer to provide that you may add "decedent" after the plaintiff. In other words, one of their defenses is that they allege that his death was caused by his own negligence.

Then they specifically set forth in their fifth defense, in the alternative, the defendant denies any violation of the Federal Safety Appliance Act contributed in all or in part to the death of plaintiff's decedent, and alleges that if the death of plaintiff's decedent was caused in whole or in part by the negligence of the defendant in the paragraphs which I read to you a few minutes ago, plaintiff's decedent was guilty of contributory negligence by reason whereof the damages recoverable by plaintiff shall be diminished in proportion
356 to the amount of negligence attributable to him.

And then in the eighth defense they specifically set forth that the defendant denies that the Federal Safety Appliance Act applies to the movement referred to in Sub-Paragraph C of Paragraph 6 of the plaintiff's complaint. That is in the third allegation that I gave you a little while ago, as amended, specifically denies that the coupler referred to in said Sub-Paragraph failed to comply with the provisions of the Federal Safety Appliance Act.

So much for the pleading as to what the plaintiff is alleging and what the defendant answers thereto.

Now, you will recall from reading of the pleadings that there are three acts of negligence charged by the plaintiff. The first, may we say, is more or less a general violation of the Federal Employers' Liability Act. The third gives the specific violations of the Federal Safety Act with reference to couplers. Those are the three acts of negligence that the plaintiff charges, and the defendant denies them, and also sets up contributory negligence.

Now, the Federal Employers' Liability Act which was in force at the time of this occurrence is an Act of
357 Congress, providing that every common carrier by railroad while engaged in the commerce between any of the several states of the United States, shall be liable in damages to any person suffering injury or death while he is employed by such carrier in such commerce, from the negligence of any of the officers, agents or employees of such carrier or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

The Act also provides if injury or death is contributed to by the negligence, contributory negligence of the party injured or killed, he is partly responsible, that that may be taken into consideration and to the extent to which he is responsible, and that damages may be proportionately cut down.

Now, the Act refers to the commerce between the various states as a condition for being applicable. So that you will not disturb yourselves with that particular question of law. I instruct you at this time as a matter of law that under the evidence that has been heard in this case and under the terms of the stipulation which has heretofore been agreed upon by the parties and
358 which was read to you, that both the plaintiff's decedent and the defendant railroad company were at this time and place engaged in interstate commerce in the meaning of that Act. So you can assume that what they were doing there is interstate commerce as defined in the Act.

Now, in the last two charges of the plaintiff's complaint referred to there has been a lot of discussion about this Federal Safety Appliance Act insofar as it applies to this particular case. I will read it to you. It provides in Section 2 of Title 4 to 45 of the United States Code Annotated, as follows:

"It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers or coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars."

That is the statute. Now, that statute places upon the railroad engaged in the type of business that this railroad was engaged in at the time of this occurrence an absolute duty to provide the couplers which I have just read to you from the statute, and to provide them
359 in such order as the statute indicates.

Now, there are two parts in this case, as counsel have told you, as we have gone along. The first is the question of liability. If you decide that in favor of the plaintiff and against the defendant, then you come to the question of damages.

The mere happening of an accident by which the plaintiff's intestate or plaintiff's decedent lost his life does not in and of itself create a liability upon the defendant to pay for it. They have to meet their burden of proof which I will attempt to define to you a little further on. You must first establish that the defendant is liable. So that when you go to the jury room for the consideration of this case you must first determine whether or not the defendant is guilty of one or more or all of these acts of negligence to which I have just referred. In the natural sequence of consideration of a case of this kind you will determine that before you concern yourselves with the question of damages, and if you determine that against the plaintiff or in favor of the defendant, then you will not have to consider the question of damages at all.

Now, the three acts charged by the complaint which I have already referred to, in order for the
360 plaintiff to recover she must prove, as I say, by a preponderance or greater weight of the evidence that the defendant was guilty of one or all three, but at least one must be proved.

Now, she must further prove that such negligence of the defendant was the proximate cause of the death of the decedent in this case. And if you find the defendant guilty on only the first one, which is the general one, then you must also find whether or not the plaintiff's decedent was guilty of any contributory negligence contributing to his injury and death. And if so, the amount of his recovery is scaled down proportionately to the amount he contributed to his own injury. But if you find the defendant guilty on either of the other two, second or third, that is, the violation of the Federal Safety Act, then the question of contributory negligence does not enter into it at all.

If you find the defendant guilty of the violation of the Federal Safety Act that I just read to you, and you further find that that violation was the proximate cause of the decedent's death at that time, then his contributory negligence has no bearing whatsoever in the matter. But if you find him not guilty of this, and then find
361 him guilty of the first one, then you must also find that he was guilty of contributory negligence, and if so, how much.

Now, I have used some terms here that I think I ought to explain to you. First of all, negligence: Negligence is perhaps most easily defined as the doing of something which an ordinarily reasonably prudent man or woman would not have done under similar or like circumstances, or the failure to do something which an ordinarily reasonably prudent man or woman under like or similar circumstances would have done.

Now, contributory negligence is just negligence contributing to a result, the negligence of the party for whom the suit was brought, or negligence in this case of the party killed is the general definition of negligence.

Perhaps the simplest definition of proximate cause, generally given by the Supreme Court of the United States in one sentence some time ago, and which Mr. Justice McKenna said approximate cause is that but for which the result would not have occurred. However, it is also defined, and I mean wherever I have used it in these instructions, as that cause which of itself or in termination with other causes, in natural and continuous sequence, unbroken by any efficient inter-
362 vening cause, produced the result complained of and without which the result would not have occurred. It need not be the sole cause, nor the last or nearest cause; it is sufficient if it occurs with some other cause acting at the same time, which in termination of it causes the injury. It is still that but for which the result would not have happened. That is the simplest definition of it.

Now, if you believe from a preponderance of the evidence, and I will tell you what that means in a little while, under the instructions of the Court, that the defendant, at the time and place in question, used and operated a car with a defective coupler, contrary to the provisions of the Federal Safety Appliance Act, and that said coupler broke, and that as a direct and proximate result thereof, the plaintiff's decedent sustained injuries which resulted in his death, then you may find the defendant guilty. But as I said before, in the event you find that such violation of the Federal Appliance Act is the proximate cause of his death, then negligence or contributory negligence on the part of the decedent is entirely immaterial and does not affect his right to recover the amount of damages.

Now, as I have told you in the beginning, the fact
363 of an accident carries with it no presumption of negligence on the part of the defendant. That is an affirmative fact for the plaintiff to prove. Plaintiff must prove that the defendant has been guilty of negligence as alleged in the plaintiff's complaint, one of these three things that I have been enumerating to you. It is not sufficient for the plaintiff to show that the defendant may possibly have been guilty of negligence. The evidence must point to the fact that it was guilty of such negligence, and if you believe from all of the testimony that the matter is uncertain and it shows that William O'Donnell may have been killed in the course of the final movement of cars out of Track 5 rather than the movement in the course of which the coupler broke, you have no right to guess between these various causes and find that the negligence of the defendant was the proximate cause of the accident if there is no satisfactory foundation in the testimony for that conclusion.

The burden of proof is not upon the defendant to show that it is not guilty of any of the specific acts of negligence charged, but the burden is upon the plaintiff to show by a greater weight or preponderance of the evi-
dence that the defendant is guilty as charged in
364 the complaint. The law casts upon the plaintiff the burden of making out her case by a preponderance of evidence. Now, there is no technical meaning to the term preponderance of the evidence. It simply means that the burden is cast upon the plaintiff to support her claim by a greater weight of the evidence than the evidence adduced by the defendant, that is, the evidence brought by the plaintiff must, in your judgment, weigh at least a little more than the evidence produced by the defendant. If, in your judgment, the evidence is just evenly balanced, the plaintiff is not entitled to recover. The preponderance of evidence in a case is not alone determined by the greater number of witnesses testifying to a particular fact or state of facts. It is determined by the testimony which impresses your mind and reason as possessed of the most weight and as presents the most reasonable account of the matter in dispute.

While the plaintiff must prove her case by a preponderance of the evidence, still the proof need not be

the direct evidence of persons who saw the occurrence or things sought to be proved, but facts may also be proved by circumstantial evidence, that is, by proof of circumstances, if any, such as give rise to a
365 reasonable inference in the minds of the jury of the truth of the facts alleged and sought to be proved, provided such circumstances, together with all the other evidence bearing on such facts, constitute a preponderance of evidence, as I just defined it to you.

Now, the weight of the evidence and the credibility of the witnesses are for your consideration and determination. You are the sole judges of the credibility of the witnesses. In determining the weight to be given to the testimony of a witness you have a right to take into consideration the intelligence of the witness; the circumstances surrounding the witness at the time concerning which he testifies; his interest, if any, as shown by the evidence in the outcome of the suit; his bias or prejudice, if any, his manner on the witness stand; his apparent fairness or want of fairness; the reasonableness or unreasonableness of his testimony; his means of observation and knowledge; the relation, if any, which he bears to any party to the suit, and to the extent to which he is contradicted or corroborated by other credible evidence, if at all; and by any circumstances that tend to shed light upon his credibility.

Now, in considering this case and in passing
366 upon your verdict, you are not required to set aside your own observation and experience as men and women in the affairs of life. On the other hand, you have a right. On the other hand you have a right upon consideration of all the evidence in the light of your own common observation and knowledge as men and women experienced in the affairs of life to say where the truth lies upon any material facts in this case.

Now, as I said before, you are the sole judges of all of the questions of facts in this case, and I do not by any of these instructions which I may give you or by anything that I may have said or done during the trial of the case intend to instruct the jury as to how you should find any question of facts. That is your job and your sole responsibility.

Now, the fact that I am about to discuss the subject of plaintiff's damages and give you instructions thereon or the fact that defendant's counsel has discussed such subject with you in his argument at the end of the case is not to be taken by you as any intimation by the Court or as any admission by the defendant of any liability on the part of the defendant. You
367 still must determine first the question of liability. But in the event that you determine that favorable to the plaintiff, then I must instruct you on the question of damages.

Now, if from a preponderance of the evidence and under the instructions of the Court you find the issues for the plaintiff, then in assessing the damages, if any, you have a right to take into consideration all the testimony bearing upon that question and allow such damages as you may deem a fair and just compensation with reference to pecuniary—that means money—pecuniary injuries, if any, resulting from the death of the decedent to his widow and minor children, and in assessing plaintiff's damages, you have a right to take into consideration whatever, if anything, you may believe from the evidence his widow and minor children might reasonably have received from the decedent in a pecuniary way during the remainder of his life, if the decedent had not been killed. Now, the pecuniary loss, if any, that has been sustained must be proved the same as any other fact by a preponderance of the evidence.

Now, in assessing damages you are to confine yourselves solely to the determination of the pecuniary and monetary interest. In other words, your duty is to
368 determine the interest that the widow and children had in the continued life of the deceased. The plaintiff is entitled, in case it becomes necessary for you to assess damages, to such sum as in your judgment under the evidence in this case will be just compensation for the pecuniary loss that the wife and children have sustained by reason of the decedent's death. By pecuniary loss I mean such loss as may be compensated for in money.

You are authorized to take into consideration the evidence showing the decedent's age, the habits of the

deceased with reference to his attention to his work, and his sobriety, his business ability, his earning capacity, his disposition to contribute and care for and furnish his wife money and to take care of his children, the pecuniary loss, if any, which the jury may find from the evidence that the wife and children had sustained because of being deprived of maintenance and support, or other pecuniary advantage, which the jury might believe from the evidence they would have derived from his life thereafter, or after the time of his death.

The jury may also take into consideration the probable duration of the life of the decedent had his
369 death not been caused at the time that it was. You will also take into consideration the contribution of money or other pecuniary benefits, if any, which the evidence may show that the surviving wife and children would have received from him after the time of his death, if he had continued to live.

Taking all of those factors into consideration you must then reduce them to their present cash value and determine what is the present cash value of the pecuniary loss in your judgment, and that is the measure for damages.

Now, it is your duty to consider this case and all of its elements the same as you would a case between two private citizens instead of a case in which the plaintiff is a private citizen and the defendant a railroad corporation. Corporations and railroads are entitled to the same fair and unprejudiced treatment in courts of law as individuals are. Both the plaintiff and the defendant come into this court on the same plane. They should receive the same fair and impartial treatment at your hands.

Likewise, no sympathy nor prejudice shall play any part in your deliberations. Your deliberations shall be governed only by the facts as you have heard them and as you recall them from the witness stand, and
370 the law, as I have given it to you here in these instructions.

You will take with you to the jury room such exhibits as have been offered and received in evidence in the case.

You also will take with you two forms of verdict.

Upon arriving at your jury room you will elect one of your number foreman to preside over your deliberation. You will deliberate until you arrive at a unanimous verdict. Upon arriving at a verdict the foreman will select one of these two forms as the proper one to express the jury's verdict. Fill it out. He will sign it first, and the other eleven jurors will sign after him.

The two forms of verdict will be as follows:

"We, the jury, find the defendant guilty and assess the plaintiff's damages at the sum of blank dollars and blank cents:"

You may use that in the event that you find for the plaintiff.

The other reads:

"We, the jury find the defendant not guilty."

That you will use in the event you find for the defendant.

The married ladies on the jury will please
371 sign their names, and not their husband's names.

That is, you may sign "Mary Smith" and "Mrs. Mary Smith", if you like that title, but do not put down "Mrs. John Smith".

Opportunity will now be given to counsel in chambers and out of the hearing of the jury to object to the charge of the court. The counsel and the court reporter will step into chambers.

(Whereupon proceedings were had in chambers, reported, but not transcribed.)

372 (The following proceedings were had in chambers, out of the presence and hearing of the jury):

The Court: I think for the record you better just formally state your objections. I do not care to hear argument on that.

The plaintiff, first, please.

Mr. Ryan: Your Honor, the first thing I wish to suggest is this, that a violation of the Safety Appliance Act is in and of itself negligence. I do not believe your Honor made that plain to the jury.

The Court: I think I did very well. You make your objections specifically, please; then I will rule on them. Just enumerate them.

Mr. Ryan: We object to the failure to state that the jury may regard the violation of the Safety Appliance Act as negligence in and of itself and which is in itself sufficient to require them to find a verdict in favor of the plaintiff:

One more thing:

I object specifically to the instruction that if the jury believe it were a mere accident, that no recovery could be had because of the fact that the undis-
373 puted evidence shows that the coupler broke, and that if there were a violation of the Safety Appliance Act the mere accident instruction is inapplicable. It entitles the jury to find and reach a conclusion contrary to law.

I have one objection to make on the ground that if they find there was a violation of the Safety Appliance Act they must further find it was the proximate cause of the accident on the ground that if it were a proximately contributing cause of the accident the jury would be required to find a verdict for the plaintiff.

These are my objections, your Honor.

The Court: All of which are overruled. Each and all of them are overruled.

Objections by the defendant?

Mr. Hackbert: The defendant objects, first to the failure of the court to give each and every one of the instructions which were tendered by the defendant at the conclusion of all the evidence.

Secondly, the defendant objects to the charge of the court in so far as it submits to the jury the alleged violations of subparagraph A of Paragraph 6 of the plaintiff's complaint, for the reason that the evidence does not sustain a finding that the defendant was guilty of any act of negligence in connection with
374 the propelling and impaction of the cars as referred to in the sub-paragraph.

Next, the defendant objects to the charge of the court in so far as it submits to the jury as a basis for a finding of liability the allegations of sub-paragraph B of Paragraph 6 of the Plaintiff's complaint which relate to the alleged failure of the cars which were already standing on Track 5 to have coupled automatically by

impact or had failed to uncouple without the necessity of men going between the ends of the cars, for the reason that the evidence does not sustain a finding that the cars failed to couple automatically by impact after having been propelled in that track at a speed under such circumstances as would normally require them to couple automatically by impact.

Secondly, that there is no testimony that these care were—the couplers on any of those care were such they could not be uncoupled by the use of pin lifter, or the knuckle adjusted by the use of the pin lifter without the necessity of men going between the ends of the cars.

And, thirdly, for the reason that the evidence does not sustain a finding that any such violation of the Safety Appliance Act with respect to any of those
375 cars already on Track 5 was a proximate cause or a proximate contributing cause, to use Mr. Ryan's term, of any injury or death of the plaintiff's decedent.

Next, the defendant objects to the charge of the court in so far as it submits to the jury as the basis for liability the charges contained in sub-paragraph C of Paragraph 6 of the plaintiff's complaint as amended, for the reason that as a matter of law the breaking of a coupler does not prove nor permit an inference to a violation of the coupler provision of the Federal Safety Appliance Act as referred to in that subparagraph as amended.

Next, the defendant objects to the court's instructions that as a matter of law at the time and place of the accident the decedent and the defendant were both operating under and subject to the provisions of the Federal Employer's Liability Act and for the reason that it is the contention of the defendant that the evidence produced upon the trial and the stipulation of the parties are such as to permit the jury to draw an inference that the duties of the plaintiff's decedent did not directly or did not closely and substantially affect interstate transportation; but that the connection, if any, between his duties and his activities on the night
376 of the accident or immediately prior to the time and place of his injury, might be found by the jury

to have so remote a connection, if any, as to not bring him within the scope of the Federal Act.

Next, the defendant objects to the court's charge in so far as it instructed the jury that the contributory negligence, if any, of the decedent was not to be considered if the jury found that the defendant was guilty of a violation of the Federal Safety Applicance Act as charged in sub-paragraph C of Paragraph 6 of the plaintiff's complaint, for the reason that it is our contention that the fact that the coupler broke does not permit the jury to find that there was a violation of the absolute duty imposed by the specific language of Section 2 of the Federal Safety Applicance Act but that the evidence that the coupler broke could give rise must fail to have inference of negligence and that liability is predicated upon a finding of negligence and that the question of contributory negligence ought to be considered by the jury in that respect.

Finally, we object to so much of the court's instruction on the question of damages as permits the jury to consider the life expectancy of the decedent for
377 the reason that there was no evidence received upon the trial in question as to what his life expectancy was or might be and that to permit the matter to be considered by the jury in this state of the record permits them to base their conclusion as to damages upon the conjecture and speculation as to the number of years of expectancy which lay ahead of the decedent.

The Court: All of which are each and all overruled.

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378 The following proceedings were had in the hearing and presence of the Jury in the court room):

The Court: The Marshal will arise and be sworn.

(Marshal sworn.)

The Court: The Jury will retire and deliberate upon its verdict.

(Whereupon the jury retired to deliberate upon its verdict and the following additional proceedings were had in the court room out of the presence of the jury):

The Court: You may assemble the exhibits. Is there any objection to the exhibits going to the jury?

Mr. Ryan: I have no objection.

Mr. Hackbert: I have no objection.

The Court: The Marshal will take all of the exhibits and these two forms of verdict and deliver them to the jury.

Now, gentlemen, how long do you suggest that I allow the jury to deliberate? I don't like to keep the Marshal. You will provide for a sealed verdict I take it?

Mr. Ryan: Yes, your Honor, whatever your Honor—

The Court: You don't keep the Court here. I will be here until about three o'clock. Then I am going
379 up to the Court of Appeals to a Judges' meeting.

I will not be back after that. If they do not arrive at a verdict before then, is it agreeable to both sides that the sealed verdict be opened and read in the morning?

Mr. Hackbert: It is agreeable to the defendant.

Mr. Ryan: It is agreeable to the plaintiff.

The Court: There will be an order accordingly.

How long do you think we should let them deliberate? If they do not arrive at a verdict by ten o'clock tonight, I think it is plain they will not. Do you think that is fair?

Mr. Ryan: I think that is fair, yes.

The Court: Satisfactory to both sides?

Mr. Hackbert: I have never fixed the time for the jury to stay out that long, Judge.

Mr. Ryan: I have.

The Court: I have on one or two criminal cases. I never have on a civil case. We will set it then at ten o'clock. If they have not arrived at a verdict by ten o'clock why the Marshal will wait here and he will send them home. Is that satisfactory?

Mr. Hackbert: That is right.

The Court: Thank you, Gentlemen. We will adjourn.

Mr. Ryan: Thank you for your consideration.

380 The Court: We will adjourn until the return of the jury's verdict.

(Whereupon an adjournment was taken until Thursday, October 2, 1947 at ten o'clock A. M.)

381 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

• • (Caption—No. 46 C 1493) • •

Transcript of proceedings had before the Hon. William J. Campbell, one of the judges of said Court in his Court Room, U. S. Court House, Chicago, Illinois, on Thursday, October 2, 1947, at ten o'clock A. M.

Present:

Mr. Joseph D. Ryan,
appeared on behalf of plaintiff;
Mr. Harlan L. Hackbert,
appeared on behalf of defendant.

382 The Clerk: No. 46 C 1493, Sarah O'Donnell v. Elgin, Joliet and Eastern Railway Company, for reading jury's verdict.

The Court: Do you have the verdict of the Jury, Mr. Marshal?

Mr. Marshal: Yes, sir.

The Court: Deliver it to the Clerk.

The Marshal: Yes, sir.

The Court: The Clerk will open and read the verdict.

The Clerk (reading): "We, the Jury, find the defendant not guilty."

Signed by Helen K. Beebe, foreman and eleven other jurors.

The Court: Very well, let the same be spread of record.

Mr. Hackbert: Can we move for judgment on the verdict at this time?

The Court: It may be entered.

(Which were all of the proceedings had in the above entitled matter.)

383 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

• • (Caption—No 46 C 1493) • •

CERTIFICATE.

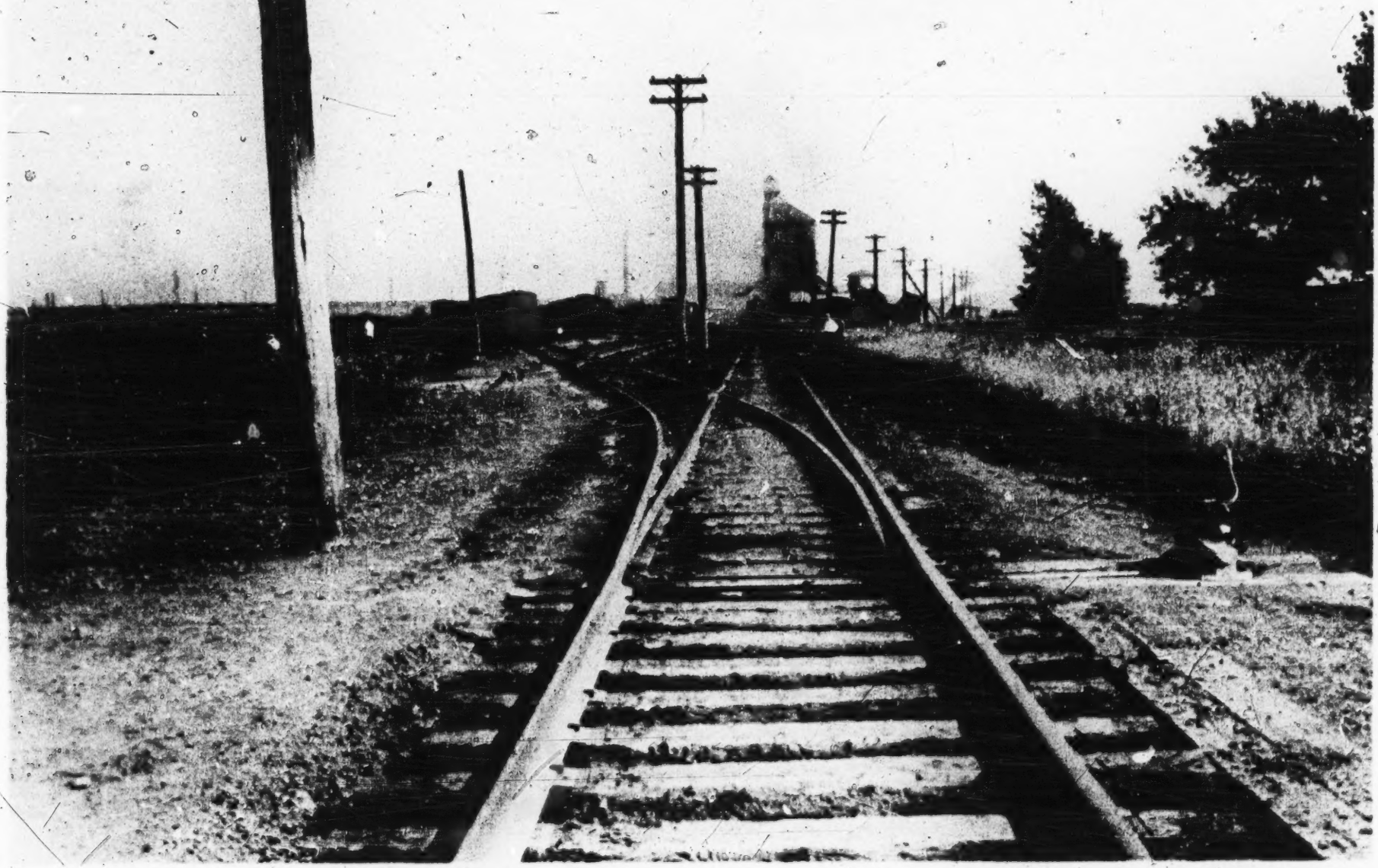
I hereby certify that the above and foregoing is a full, true and accurate transcript of the original shorthand notes taken upon the trial of the above entitled case.

Paul A. Ruhe,
Official Court Reporter
U. S. District Court,
Northern District of Illinois.

February 9, 1948.

385 PLAINTIFF'S EXHIBIT NO. 2.

Camera placed in center of Track 27, facing west, approximately 25 feet west of terminal lead switch.



*Plaintiff's Exhibit No. 2*

386 PLAINTIFF'S EXHIBIT NO. 3.

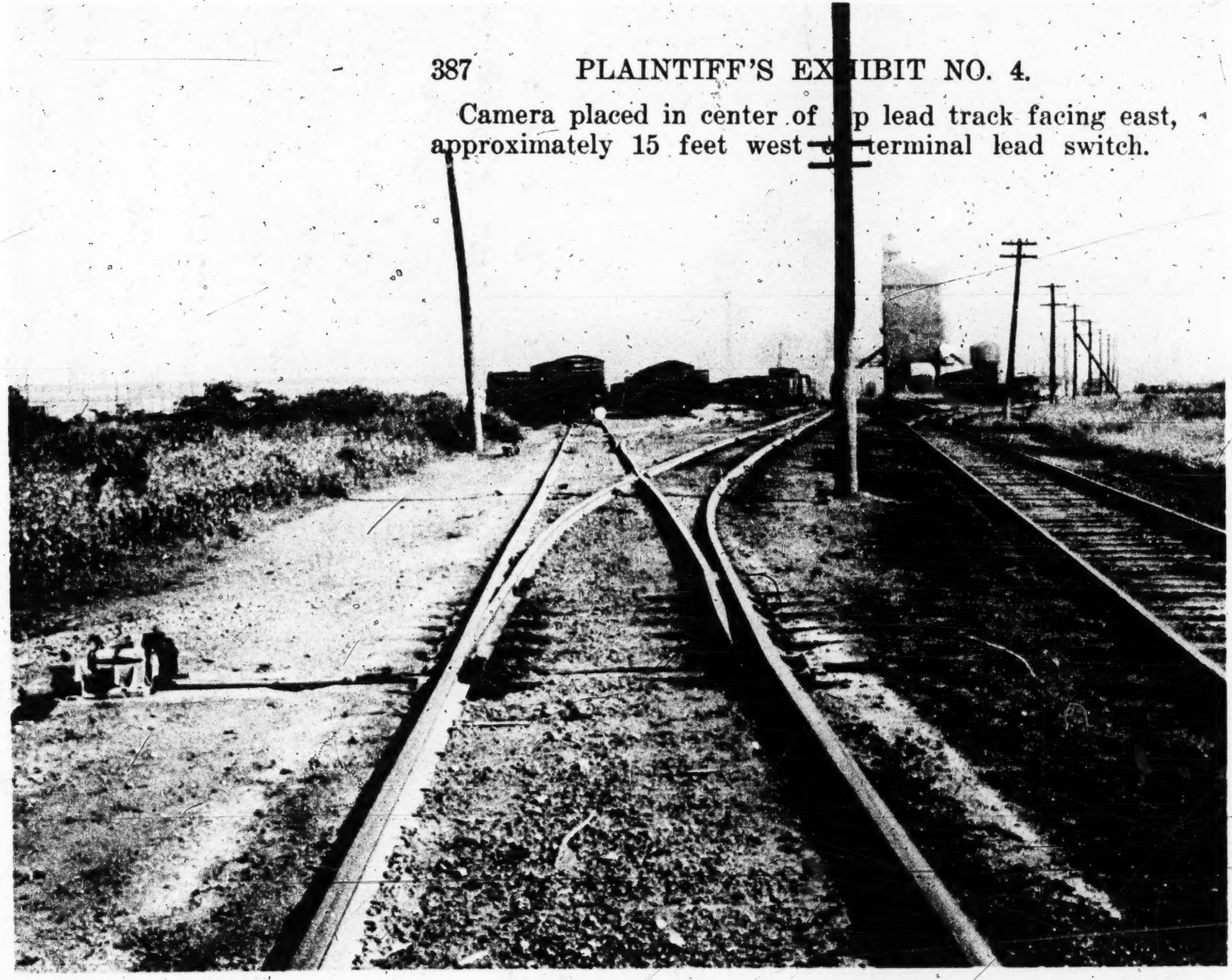
Camera placed in center of rip lead track, facing east, approximately 40 feet west of switch leading to track # 3.

204

*Plaintiff's Exhibit No. 3*

387 PLAINTIFF'S EXHIBIT NO. 4.

Camera placed in center of up lead track facing east, approximately 15 feet west of terminal lead switch.



*Plaintiff's Exhibit No. 4*

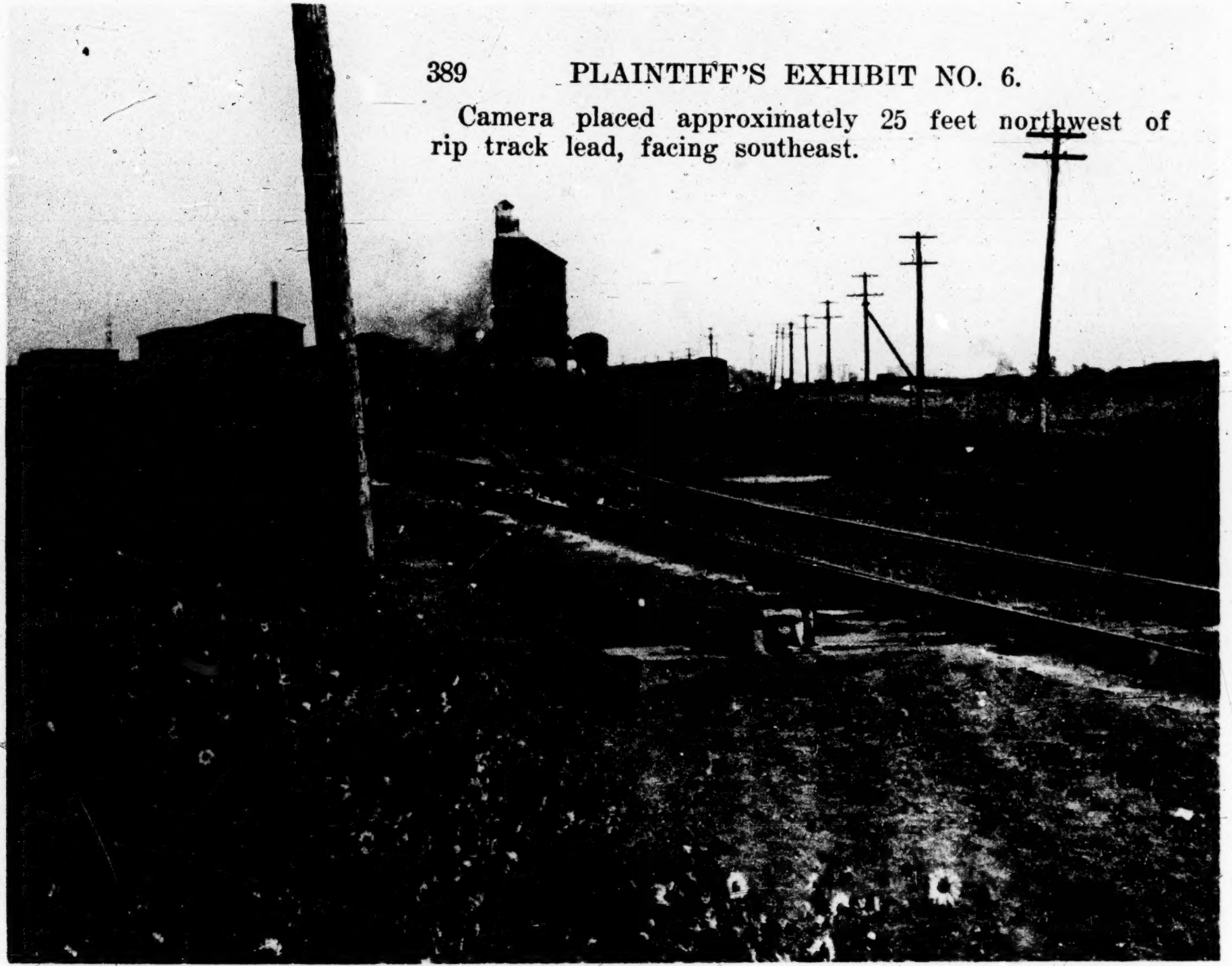
388 PLAINTIFF'S EXHIBIT NO. 5.

Camera placed in center of rip lead track, facing east, approximately 40 feet west of switch leading to track #1.

206 Plaintiff's Exhibit No. 5

389 PLAINTIFF'S EXHIBIT NO. 6.

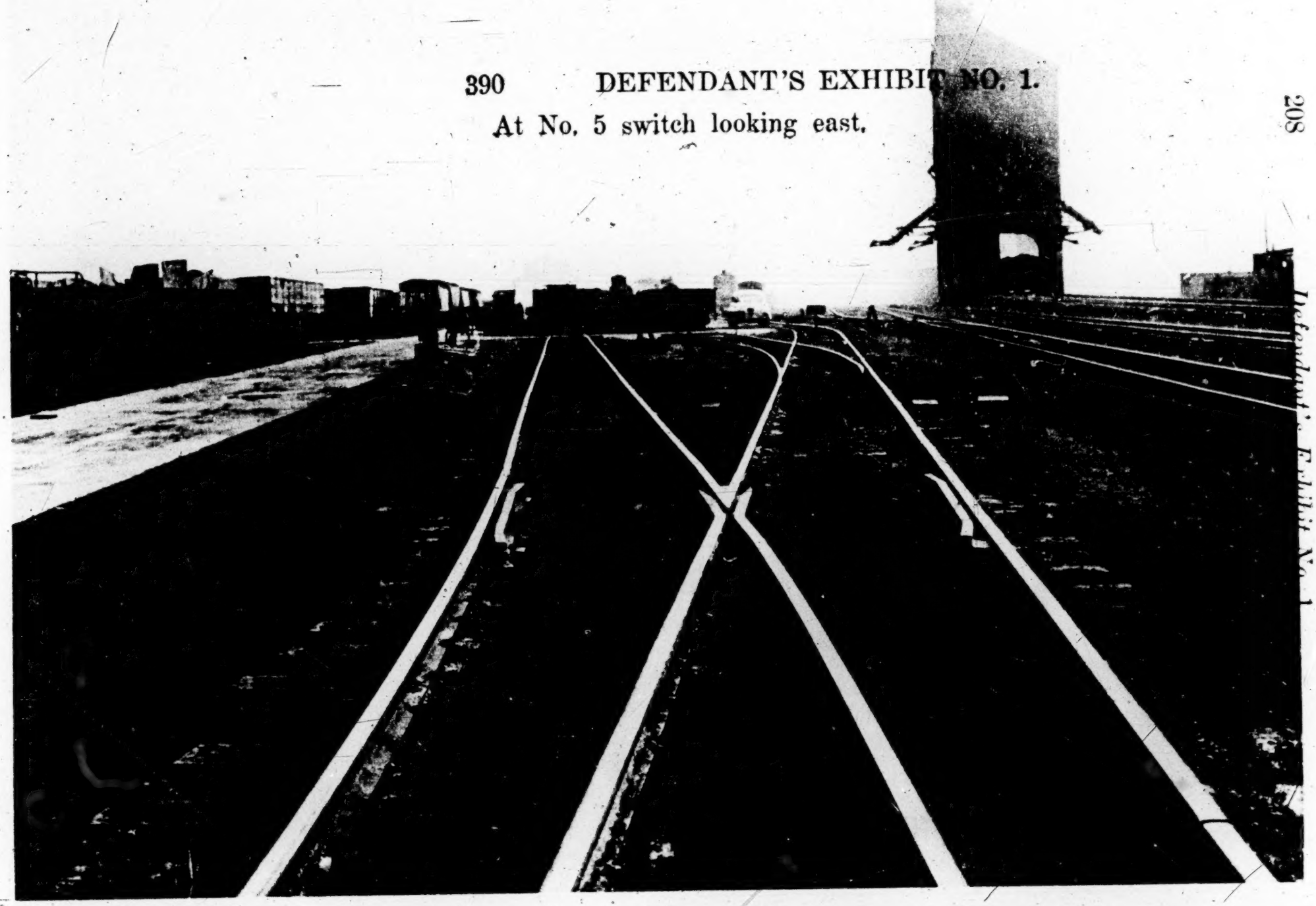
Camera placed approximately 25 feet northwest of rip track lead, facing southeast.



DEFENDANT'S EXHIBIT NO. 1.

At No. 5 switch looking east.

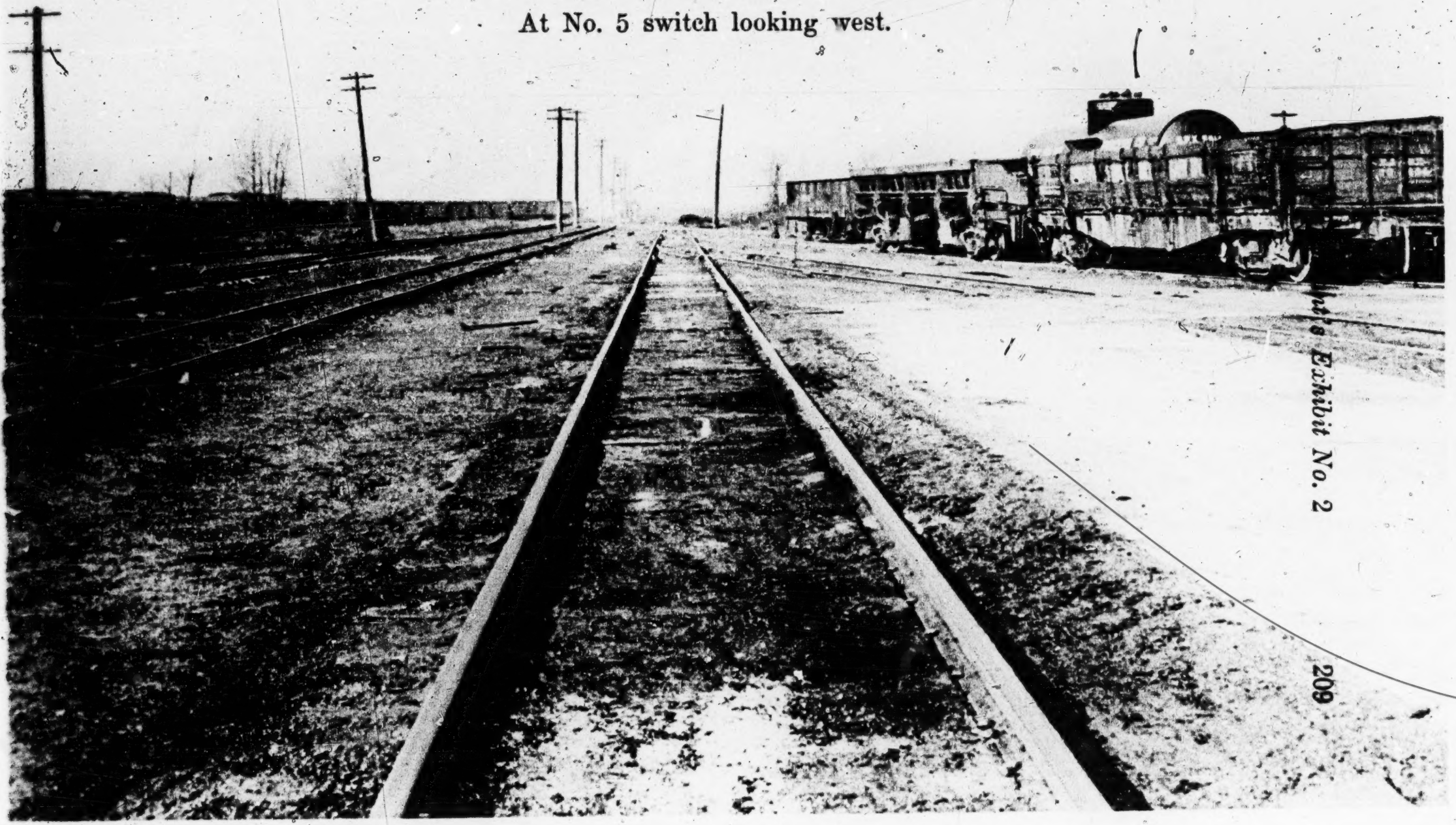




Defendant's Exhibit No. 1.

391 DEFENDANT'S EXHIBIT NO. 2.

At No. 5 switch looking west.

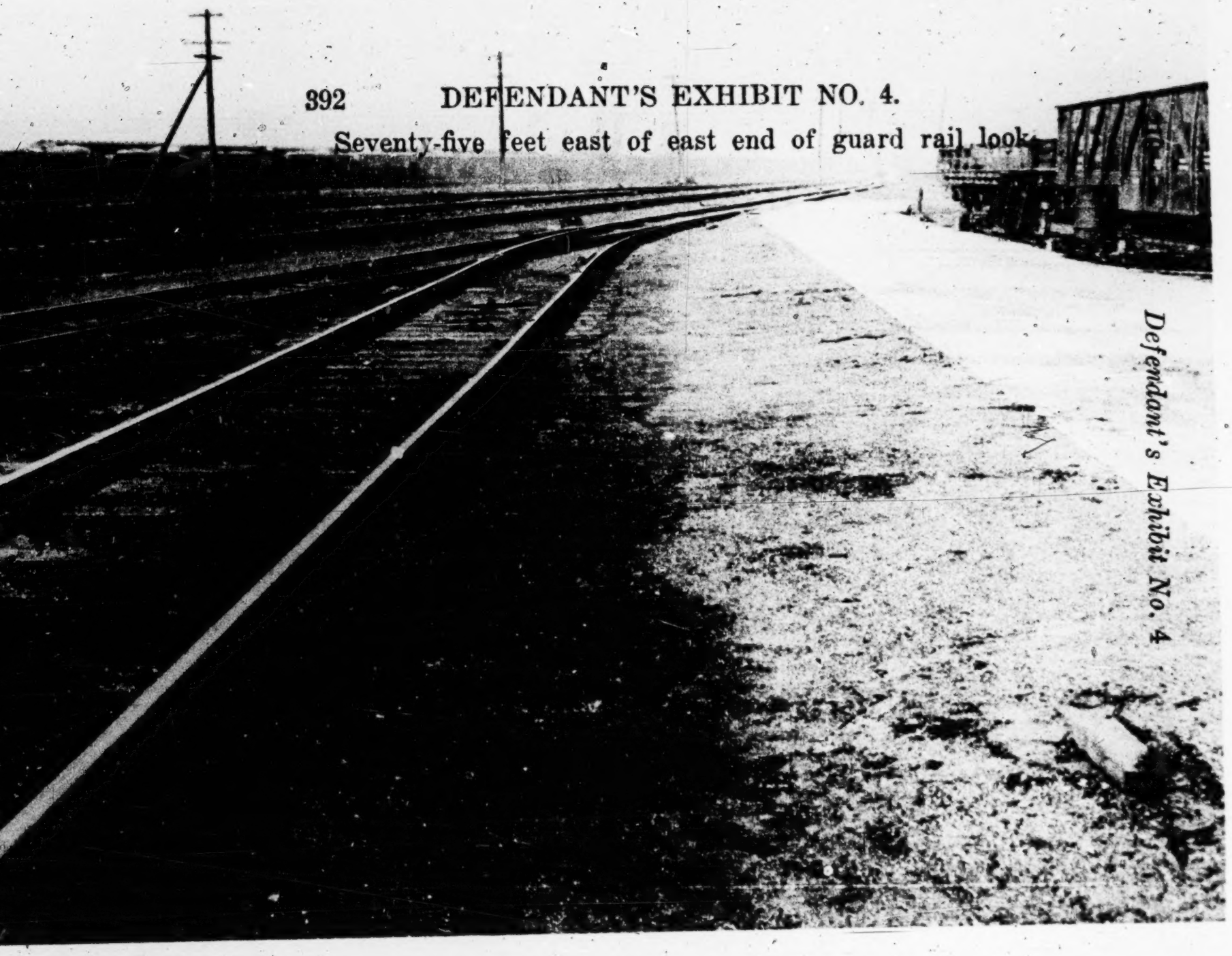


Def's Exhibit No. 2

209

392 DEFENDANT'S EXHIBIT NO. 4.

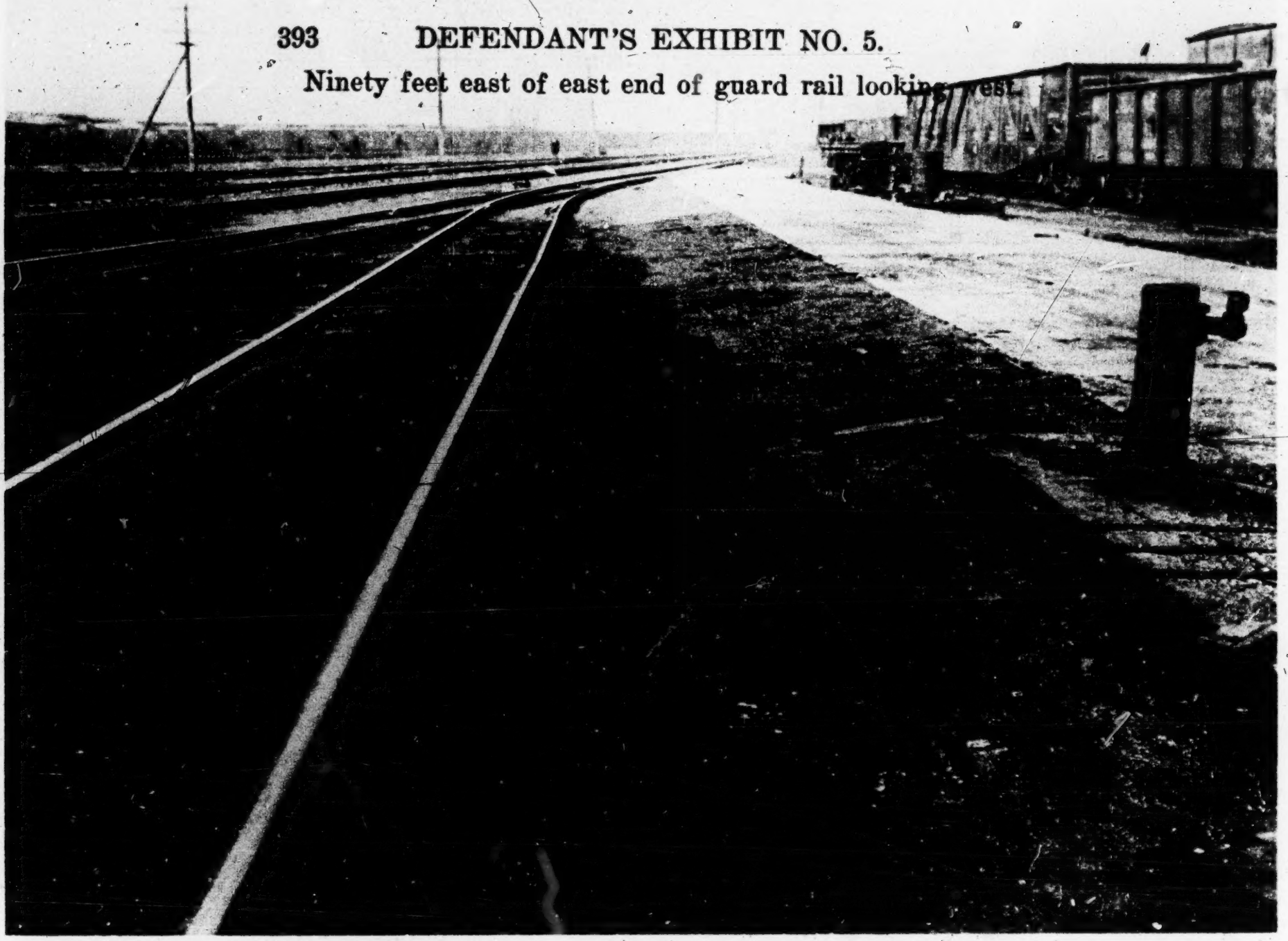
Seventy-five feet east of east end of guard rail, look



*Defendant's Exhibit No. 4*

393 DEFENDANT'S EXHIBIT NO. 5.

Ninety feet east of east end of guard rail looking west.



394 DEFENDANT'S EXHIBIT NO. 6.

Fifty feet west of No. 5 switch looking east.



212

Defendant's Exhibit No. 6

395 And on the same day, to wit, the 30th day of September, 1947 came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Motion For Directed Verdict At The Close Of All The Evidence in words and figures following, to wit:

396 IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

• • (Caption—No. 46 C 1493) • •

MOTION FOR DIRECTED VERDICT AT THE CLOSE OF ALL THE EVIDENCE.

Now comes the defendant Elgin, Joliet and Eastern Railway Company, a corporation, by Knapp, Cushing, Hershberger and Stevenson and Harlan L. Hackbert, its attorneys, at the close of all the evidence in this case and moves the court to exclude the evidence introduced in this case from the consideration of the jury and to give to the jury an instruction to find the defendant not guilty for the following reasons:

1. There is no competent evidence which, together with all of the inferences which may reasonably be drawn therefrom, establishes that the defendant was guilty of the negligence charged in plaintiff's complaint.

2. There is no competent evidence which, together with all of the inferences which may reasonably be drawn therefrom, establishes that any act of negligence, as alleged in plaintiff's complaint, was the proximate cause of the death of the plaintiff's decedent.

Respectfully submitted,
Knapp, Cushing, Hershberger & Stevenson,
Harlan L. Hackbert,
Attorneys for Defendant.

397 And afterwards, to wit, on the 1st day of October, 1947, being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William J. Campbell, District Judge, appears the following entry, to wit:

398 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

• • (Caption—No. 46 C 1493) • •

This being the day to which this cause was continued for further trial again come the parties to this suit by their attorneys, respectively, and the Jury heretofore empaneled and sworn herein also come and the trial of this cause proceeds and it is

Ordered that leave be and it is hereby given to the defendant to file instanter an amendment to its answer and the motion of the plaintiff for a directed verdict entered at the close of all the evidence is hereby taken under advisement by the Court and the motion of the defendant for a directed verdict entered at the close of all the evidence, heretofore denied, is now also taken under advisement by the Court, and the Jury having heard all the evidence, the arguments of counsel and instructions of the Court retire to their rooms with sworn Marshals to deliberate on their verdict and on agreement of the parties by their counsel now made in open Court it is

Further Ordered that if the Jury fail to arrive at a verdict by 10:00 o'clock of this day the Jurors shall be discharged by the Marshal from further service herein and on like agreement it is

Further Ordered that is the Jury arrive at a verdict between the hours of 3:00 o'clock P. M., and 10:00 o'clock P. M., of this day they shall reduce it to writing, sign and seal the same and place it in the custody of the United States Marshal to be returned in open Court at 10:00 o'clock A. M., on October 2, 1947, the United States Marshal to discharge the Jury, and on agreement of the parties by counsel now made in open Court polling of the Jury is waived.

399 And afterwards on, to wit, the 2nd day of October, 1947 there was filed in the Clerk's office of said Court a certain Verdict in words and figures following, to wit:

400 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

• • (Caption—No. 46 C 1493) • •

VERDICT.

We, the Jury, find the defendant not guilty.

Helen K. Beebe,
Foreman
Louise R. Boynton
Maybelle Cross
E. F. Cisar
Mary Keller
Frances Schneider
Rose Malone
George J. Walsh
Theodore Yeschke
Robert M. Neil
Irwin Maneskey
Mariam N. Schwarz.

401 And on the same day, to wit, on the 2nd day of October, 1947, being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William J. Campbell, District Judge, appears the following entries, to wit:

402 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

• • (Caption—No. 46 C 1493) • •

This day again come the parties to this suit by their attorneys, respectively, and the Jury heretofore empaneled and sworn herein for the trial of this cause also come and render their verdict and on their oath do say:

"We, the Jury, find the defendant not guilty"

Therefore it is

Considered, Ordered and Adjudged by the Court that the plaintiff, Sarah O'Donnell, Administratrix of the

5

Estate of William O'Donnell, Deceased, take nothing by this cause of action and that the defendant, Elgin, Joliet & Eastern Railway Company, a corporation, go hence without day and do have and recover of and from said plaintiff its costs and charges in this behalf expended and have execution therefor.

403 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

• • (Caption—No. 46 C 1493) • •

The motion of the plaintiff by counsel to vacate the judgment order heretofore entered herein and for a new trial and the motion of the plaintiff for a directed verdict entered at the close of all the evidence are hereby taken under advisement pursuant to Rule 7 of this Court and it is

Ordered that plaintiff's supporting brief be filed by October 22, 1947, defendant's opposing brief to be filed by November 12, 1947, and plaintiff's reply brief to be filed by November 24, 1947, whereupon said motions will be disposed of by the Court without further argument.

404 And afterwards on, to wit, the 10th day of October, 1947, came the Plaintiff by her attorneys and filed in the Clerk's office of said Court her certain Motion For New Trial, and Motion For Directed Verdict in words and figures following, to wit:

405 IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

• • (Caption—No. 46 C 1493) • •

MOTION FOR NEW TRIAL.

Comes now Sarah O'Donnell, administratrix of the Estate of William O'Donnell, deceased, plaintiff herein, by Joseph D. Ryan, her attorney, and moves that the verdict of the jury herein be set aside and a new trial granted for the following reasons:

1. The verdict is against the manifest weight of the evidence.

2. The verdict is against the preponderance of the evidence.

3. The verdict is against the law.

4. The verdict is contrary to the law and the evidence.

5. The argument of defendant's counsel to the jury was improper and prejudicial to the plaintiff, and was calculated to and did mislead and confuse the jury as to the evidence and the law.

6. The court erred in overruling plaintiff's motion to find the issues for the plaintiff at the close of all the evidence.

406 7. The court erred in instructing the jury as follows:

"Plaintiff must prove that the defendant has been guilty of negligence as alleged in the plaintiff's complaint, one of the three things that I have been enumerating to you. It is not sufficient for the plaintiff to show that the defendant may possibly have been guilty of negligence. The evidence must point to the fact that it was guilty of such negligence, and if you believe from all of the testimony that the matter is uncertain and it shows that William O'Donnell may have been killed in the course of the final movement of cars out of track 5 rather than the movement in the course of which the coupler broke, you have no right to guess between these various causes and find that the negligence of the defendant was the proximate cause of the accident if there is no satisfactory foundation in the testimony for that conclusion."

Said portion of the charge was erroneous in that it required the jury, before finding the defendant guilty, to convict it of negligence, without informing them that a violation of the Safety Appliance Act was negligence per se; in failing to inform the jury that it was their duty and function to draw such reasonable inferences from the testimony as they might consider proper, and that a verdict might be based on such inferences; and in practically directing the jury that no verdict could

be based on circumstantial evidence. The jury were thereby invited to find that the decedent came to his death at the time of the final movement of the cars from track 5.

8. The court erroneously failed to charge the jury that a violation of the Safety Appliance Act is negligence in and of itself, and is in itself sufficient to require a verdict in favor of the plaintiff, provided it caused or proximately contributed to cause the accident. The jury were permitted and encouraged to find as a fact that the breaking of the coupler was not a violation of the Safety Appliance Act.

9. The court erroneously charged the jury as follows:

"The mere happening of an accident by which the plaintiff's intestate or plaintiff's decedent lost his life does not in and of itself create a liability upon the defendant to pay for it. * * * Now, as I have told you in the beginning, the fact of an accident carries with it no presumption of negligence on the part of the defendant. That is an affirmative fact for the plaintiff to prove."

Such charge was erroneous and inapplicable to the facts in this case since the undisputed evidence shows that there was a violation of the Safety Appliance Act. Negligence is conclusively presumed from a Safety Appliance Act violation, which is the cause of or proximately contributes to cause an accident.

10. The court erred in charging the jury as follows:

"Now, if you believe from a preponderance of the evidence, and I will tell you what that means in a little while, under the instructions of the court, that the defendant, at the time and place in question, used and operated a car with a defective coupler, contrary to the provisions of the Federal Safety Appliance Act, and that said coupler broke, and that as a direct and proximate result thereof, the plaintiff's decedent sustained injuries which resulted in his death, then you may find the defendant guilty."

Said charge was erroneous in that the jury might properly find the defendant guilty if the violation of the

Safety Appliance Act was a proximately contributing cause of the accident; it need not be the sole proximate cause as impliedly assumed in the instructions of the court. Said charge was further erroneous in that the jury were thereby instructed that they "might" find the defendant guilty if the Safety Appliance Act violation was the proximate cause of the accident; whereas under such circumstances the jury were bound to find the defendant guilty, and the charge should have been peremptory.

408 11. The court erred in overruling plaintiff's objection to that part of the defendant's argument which was to the effect that the breaking of the coupler was not a violation of the Safety Appliance Act, and that the railroad was required to use ordinary care only with respect thereto; and in failing to instruct the jury that the breaking of the coupler was a violation of the Safety Appliance Act as a matter of law.

12. In instructing the jury that the mere happening of the accident does not create a liability, and that the jury have no right to guess between the various causes in determining the proximate cause of the accident, the court contradicted and destroyed the value of that portion of its charge in which it told the jury that facts might be proved by circumstantial evidence.

13. The verdict of the jury cannot be accounted for on any hypothesis other than passion, prejudice or an utter misconception of the law and the evidence.

Joseph D. Ryan,
Attorney for Plaintiff.

Received a copy of the above and foregoing Motion for New Trial this 10th day of October, 1947.

Knapp, Cushing, Hershberger & Stevenson.
Attorneys for Defendant.

409 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

• • (Caption—No. 46 C 1493) • •

MOTION FOR DIRECTED VERDICT.

Comes now Sarah O'Donnell, Administratrix of the Estate of William O'Donnell, deceased, plaintiff herein, by Joseph D. Ryan, her attorney, and moves that the verdict of not guilty entered herein and the judgment on said verdict be set aside, and that judgment be entered herein for the plaintiff in accordance with her motion made at the close of all the evidence.

Joseph D. Ryan,
Attorney for Plaintiff.

Received a copy of the above and foregoing Motion for Directed Verdict this 10th day of October, 1947.

Knapp, Cushing, Hershberger & Stevenson,
Attorneys for Defendant.

410 And afterwards, to wit, on the 22nd day of October, 1947, being one of the days of the regular October term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Walter J. LaBuy, District Judge, appears the following entry, to wit:

411 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

• • (Caption—No. 46 C 1493) • •

It Is Ordered by the Court that leave be and it is hereby given to the plaintiff to file instanter an amendment to motion for a new trial.

412 And on the same day, to wit, the 22nd day of October, 1947 came the Plaintiff by her attorneys and filed in the Clerk's office of said Court her certain Amendment To Motion For New Trial in words and figures following, to wit:

413 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

• • (Caption—No. 46 C 1493) • •

## AMENDMENT TO MOTION FOR NEW TRIAL.

Comes now Sarah O'Donnell, Administratrix of the Estate of William O'Donnell, Deceased, plaintiff herein, and by leave of court first had and obtained, files this Amendment to her Motion for New Trial heretofore filed herein, as follows:

14. The court advised counsel that he would instruct the jury on the law as to the Safety Appliance Act, and in effect warned counsel that no objection to the argument should be made.

15. The court erroneously submitted to the jury as a question of fact whether the breaking of the coupler was a violation of the Safety Appliance Act.

16. The court failed to advise counsel as to its proposed action on the requests, prior to the arguments to the jury, contrary to Rule 51 of the Rules of Civil Procedure.

Joseph D. Ryan,
Attorney for Plaintiff.

Joseph D. Ryan
100 N. La Salle Street
Chicago, Illinois
Franklin 5124

414 And afterwards, to wit, on the 12th day of December, 1947, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William J. Campbell, District Judge, appears the following entry, to wit:

415 In the District Court of the United States
For the Northern District of Illinois
Eastern Division

• • (Caption—No. 46 C 1493) • •

This cause having been heretofore taken under advisement on the motion of the plaintiff to vacate the judgment heretofore entered herein and for a new trial and the motion of the plaintiff for a directed verdict at the close of all the evidence, after due consideration of the briefs of counsel and other papers filed herein and the Court being fully advised in the premises it is

Ordered that the motion of the plaintiff for a directed verdict be and it is hereby denied and that the motion of the plaintiff to vacate the judgment heretofore entered herein and for a new trial be and it is hereby also denied.

416 And afterwards on, to wit, the 3rd day of February, 1948 came the Plaintiff by her attorney and filed in the Clerk's office of said Court her certain Notice of Appeal in words and figures following, to wit:

417 Appeal to the
Circuit Court of Appeals
For the Seventh Circuit from
The District Court of the United States
For the Northern District of Illinois
Eastern Division

• • (Caption—No. 46 C 1493) • •

NOTICE OF APPEAL.

To: Messrs. Knapp, Cushing,
Hershberger & Stevenson
208 S. La Salle Street
Chicago, Illinois
Attorneys for Defendant-Appellee

Comes now Sarah O'Donnell, Administratrix of the Estate of William O'Donnell, Deceased, and appeals from the judgment entered in this cause on October 2, 1947, in favor of the defendant and against the plaintiff,

and from the judgment entered in this cause on December 12, 1947, wherein plaintiff's motions for new trial and for a directed verdict were denied and judgment was again entered upon the verdict in favor of defendant and against the plaintiff.

Said appeal is hereby taken to the Circuit Court of Appeals for the Seventh Circuit.

Appellant will ask that the judgments hereinabove referred to be reversed and that this cause be remanded for a new trial, or in the alternative for the assessment of damages.

Sarah O'Donnell,
Plaintiff-Appellant.

By: Joseph D. Ryan,
Her Attorney.

418 Received a copy of the above and foregoing Notice of Appeal this 3rd day of February, A. D. 1948.

Knapp, Cushing, Hershberger & Stevenson,
Attorneys for Defendant-Appellee.

(Attached hereto is the following certificate):

419 In the District Court of the United States
For the Northern District of Illinois
Eastern Division

CERTIFICATE OF MAILING.

I, Roy H. Johnson, Clerk of the United States District Court, for the Northern District of Illinois, Eastern Division, keeper of the Seal and Records of said Court, do hereby certify that on the 4th day of February, 1948, in accordance with Rule 73 (b) of the Rules of Civil Procedure for District Courts of the United States, I mailed a copy of the foregoing Notice of Appeal to the following attorneys of record:

Knapp, Cushing, Hershberger & Stevenson
208 South La Salle Street
Chicago 4, Illinois

(Seal) Roy H. Johnson
Clerk.

420 And afterwards on, to wit, the 1st day of March, 1948 came the Plaintiff-Appellant by her attorneys and filed in the Clerk's office of said Court her certain Statement Of Points in words and figures following, to wit:

421 APPEAL TO THE
CIRCUIT COURT OF APPEALS
For the Seventh Circuit from
THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 46 C 1493) * *

## POINTS ON WHICH APPELLANT INTENDS TO RELY.

Comes now Sarah O'Donnell, Administratrix of the Estate of William O'Donnell, Deceased, by Joseph D. Ryan, and Louis P. Miller, her attorneys, and shows that in her appeal to the Circuit Court of Appeals she intends to rely on the following points:

1. There is no substantial evidence to support the verdict.

2. The verdict is against the law.

3. The argument of defendant's counsel to the jury was improper and prejudicial to the plaintiff and was calculated to and did mislead and confuse the jury as to the evidence and the law; the court erred in overruling plaintiff's objection to that part of the defendant's argument that the breaking of the coupler was not a violation of the Safety Appliance Act and that the railroad was required to use only ordinary care with respect thereto and in failing to instruct the jury that the breaking of the coupler was a violation of the Safety Appliance Act as a matter of law.

422 The objectionable language and the rulings thereon appear on Pages 275-278 inclusive, of the transcript of proceedings and are as follows:

> "Now, the specific language of the law is this: That the railroad company may not haul or use on its lines cars equipped with couplers which will not couple automatically by impact and which can be

uncoupled without the necessity of men going between the ends of the cars.

"The law does not say anything whatever about couplers which break, and I think after you hear Judge Campbell's instructions as to what the law is you will conclude that the requirements of the law, so far as a coupler breaking is concerned, is that the railroad company must use ordinary and reasonable care. There is not a word of evidence here that there was anything about the condition of this coupler which could have caused anyone to believe that it was at all likely that it would break. So I say if that is the law you must necessarily find that there has been no proof here that the railroad company was negligent as concerns that coupler.

"So far as the exact language of the statute, which I think Judge Campbell will tell you in his instructions, what the language is, there is not any doubt about the fact that upon this particular car, J-31421, or whatever the number was that was stated here this morning, that so far as that car is concerned it did couple automatically by impact when the engine tied onto those cars on Track 2 and pulled them out toward the west. There is not a word of evidence here, is there, that that car failed in any way to couple automatically by impact upon that movement or upon any other movement which this crew or any other crew made with that car.

Mr. Ryan: "Your Honor, I don't interrupt again, but notwithstanding your Honor's ruling, I want to protest against this argument, that breaking of a coupler is not—

The Court: "You will have a chance to protest when you answer him. Go ahead with your argument.

423 Mr. Hackbert: "There is no doubt about the fact, on the evidence in the record, that this car did couple automatically by impact. Could it be uncoupled without the necessity of men going between the ends of the cars?

"I think Jack O'Donnell testified the way the cars can be uncoupled is to use this pin lifter on the outside of the car. That is to make it unneces-

sary for men to go in between the ends of the cars, either to adjust the knuckle or to lift up this pin which unlocks the couplers and permits them to separate.

"There is not a word of evidence in this record of any attempt to uncouple that E. J. & I. car upon which the coupler broke, and that it could not uncouple without the necessity of a man going between the ends of the cars.

"So far as that car is concerned, ladies and gentlemen, when you listen to Judge Campbell's instructions, listen and see if he doesn't tell you that this is the test of a violation of the coupler provision of the Safety Appliance Act, and if that is what he tells you is the test, then necessarily you must find that this car met that test because in neither of those respects is there a word of evidence here as to any failure of that car to function in the two respects that the statute requires."

4. The court erred in overruling plaintiff's motion to find the issues for the plaintiff at the close of all the evidence.

5. The court erred in instructing the jury as follows: (transcript 334)

"Plaintiff must prove that the defendant has been guilty of negligence as alleged in the plaintiff's complaint, one of the three things that I have been enumerating to you. It is not sufficient for the plaintiff to show that the defendant may possibly have been guilty of negligence. The evidence must point to the fact that it was guilty of such negligence, and if you believe from all of the testimony that the matter is uncertain and it shows that Willian O'Donnell may have been killed in the course
424 of the final movement of cars out of track 5 rather than the movement in the course of which the coupler broke, yo have no right to guess between these various causes and find that the negligence of the defendant was the proximate cause of the accident if there is no satisfactory foundation in the testimony for that conclusion."

Said portion of the charge was erroneous in that it required the jury, before finding the defendant guilty,

to convict it of negligence, without informing them that a violation of the Safety Appliance Act was negligence per se; in failing to inform the jury that it was their duty and function to draw such reasonable inferences from the testimony as they might consider proper, and that a verdict might be based on such inferences; and in practically directing the jury that no verdict could be based on circumstantial evidence. The jury were thereby invited to find that the decedent came to his death at the time of the final movement of the cars from track 5.

6. The court erroneously failed to charge the jury that a violation of the Safety Appliance Act is negligence in and of itself, and is in itself sufficient to require a verdict in favor of the plaintiff, provided it caused or proximately contributed to cause the accident. The jury were permitted and encouraged to find as a fact that the breaking of the coupler was not a violation of the Safety Appliance Act.

7. The court erroneously charged the jury as follows: (transcript 330)

> "The mere happening of an accident by which the plaintiff's intestate or plaintiff's decedent lost his life does not in and of itself create a liability upon the defendant to pay for it * * * Now, as I have told you in the beginning, the fact of an accident carries with it no presumption of negligence on the part of the defendant. That is an affirmative fact for the plaintiff to prove."

425 Such charge was erroneous and inapplicable to the facts in this case since the undisputed evidence shows that there was a violation of the Safety Appliance Act. Negligence is conclusively presumed from a Safety Appliance Act violation, which is the cause of or proximately contributes to cause an accident.

8. The court erred in charging the jury as follows: (transcript 333)

> "Now, if you believe from a preponderance of the evidence, and I will tell you what that means in a little while, under the instructions of the court, that the defendant in question, used and operated a car with a defective coupler, contrary to the pro-

visions of the Federal Safety Appliance Act, and that said coupler broke, and that as a direct and proximate result thereof, the plaintiff's decedent sustained injuries which resulted in his death, then you may find the defendant guilty."

Said charge was erroneous in that the jury might properly find the defendant guilty if the violation of the Safety Appliance Act was a proximately contributing cause of the accident; it need not be the sole proximate cause as impliedly assumed in the instructions of the court. Said charge was further erroneous in that the jury were thereby instructed that they "might" find the defendant guilty if the Safety Appliance Act violation was the proximate cause of the accident; whereas under such circumstances the jury were bound to find the defendant guilty, and the charge should have been peremptory.

9. The court erroneously gave to the jury the following contradictory instructions (transcript 330):

426 "The mere happening of an accident by which the plaintiff's intestate or plaintiff's decedent lost his life does not in and of itself create a liability upon the defendant to pay for it * * * Now, as I have told you in the beginning, the fact of an accident carries with it no presumption of negligence on the part of the defendant. That is an affirmative fact for the plaintiff to prove."

(transcript 333 and 334)

"As I have told you in the beginning the fact of an accident carries with it no presumption of negligence on the part of the defendant. That is an affirmative fact for the plaintiff to prove. Plaintiff must prove that the defendant has been guilty of negligence as alleged in the plaintiff's complaint, one of these three things that I have been enumerating to you. It is not sufficient for the plaintiff to show that the defendant may possibly have been guilty of negligence. The evidence must point to the fact that it was guilty of such negligence, and if you believe from all of the testimony that the matter is uncertain and it shows that William O'Donnell may have been killed in the course of the final movement of cars out of track 5 rather

than the movement in the cars of which the coupler broke, you have no right to guess between these various causes and find that the negligence of the defendant was the proximate cause of the accident if there is no satisfactory foundation in the testimony for that conclusion."

(Transcript 335 and 336)

"While the plaintiff must prove her case by a preponderance of the evidence, still the proof need not be the direct evidence, of persons who saw the occurrence or things sought to be proved, but facts may also be proved by circumstantial evidence, that
427 is, by proof of circumstances, if any, such as give rise to a reasonable inference in the minds of the jury of the truth of the facts alleged and sought to be proved, provided such circumstances together with all the other evidence bearing on such facts, constitutes a *preponderance of evidence as I just defined it to you.*"

By giving the first two instructions hereinabove quoted the court contradicted and destroyed the effect of the last instruction above quoted.

10. The court erred in advising counsel that he would instruct the jury on the law as to the Safety Appliance Act, and in effect warning counsel that no objection to the argument should be made.

(Transcript 248-249)

"Mr. Hackbert: Then, if your Honor please, I re-wrote Instruction No. 9, which—

The Court: You can hand it up. Hand it up in duplicate.

Mr. Hackbert: That was an instruction of mine which referred to—

The Court: Very well.

428 Mr. Hackbert: —the allegations of negligence in the plaintiff's complaint, and his withdrawal of two of them, and the amendment of the third changed that.

In going over Mr. Ryan's tendered instructions last night—

The Court: We will not discuss the instructions. I will instruct the jury.

I have to leave at 12:30. You each have an hour argument. You will each want to argue the instructions, and you will be here two hours doing that.

Mr. Hackbert: I do not want to argue with respect to any of the separate instructions, but his instructions present two theories of his case, and I would like to know if I could at this time in general know how your Honor is going to rule on his instructions, or how you are going to instruct the jury, so that I will know what questions are open to me to argue. He is asking your Honor to instruct as a matter of law that he was engaged in interstate—

The Court: I intend to instruct the jury.

Mr. Hackbert: The other feature of the instructions is they embody his contention that a coupler which breaks in half, as this one did, violates the coupler provisions of the Federal Safety Appliance Act.

The Court: I intend to instruct the jury on the law as to the Federal Safety Appliance Act, and let them decide whether or not under my instructions on the law such a breakage is a violation thereof. Let the jury decide the facts.

Mr. Ryan: I am prepared to cite cases that that is a violation.

The Court: I think you are sufficiently informed.

Mr. Hackbert: I am sufficiently informed, your Honor.

The Court: All right. Arrange the tables and bring in the jury."

429 11. The court failed to advise counsel as to its proposed action on the requests, prior to the arguments to the jury, contrary to Rule 51 of the Rules of Civil Procedure. See portion of transcript cited under heading No. 10.

Respectfully submitted,
Joseph A. Ryan,
Louis P. Miller,
Attorneys for Plaintiff.

Received a copy of the above Points On Which Appellant Intends To Rely this 1st day of March, A. D. 1948.

H. L. Hackbert & Knapp, Cushing, Hershberger & Stevenson,
Attorneys for Defendant.

430 And afterwards on, to wit, the 9th day of February, 1948 there was filed in the Clerk's office of said Court a certain Bond On Appeal in words and figures following, to wit:

431 Know all Men by these Presents:

That we, Sarah O'Donnell, Administratrix of the Estate of William O'Donnell, Deceased, as principal, and Maryland Casualty Company, as sureties, are held and firmly bound unto Elgin, Joliet & Eastern Railway Company, a corporation, in the full and just sum of Two Hundred Fifty Dollars ($250.00) to be paid to the said Elgin, Joliet & Eastern Railway Company, a corporation, its attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this .....day of February ..... in the year of our Lord one thousand nine hundred and Forty-eight.

Whereas, lately at a session of the District Court of the United States for the Northern District of Illinois, Eastern Division, in a suit pending in said Court between Sarah O'Donnell, Administratrix of the Estate of William O'Donnell, Deceased, Plaintiff and Elgin, Joliet & Eastern Railway Company, a corporation, a judgment was rendered against Sarah O'Donnell, Administratrix of the Estate of William O'Donnell, Deceased, that she take nothing by her suit and that the defendant go hence without day and the said Sarah O'Donnell, Administratrix of the Estate of William O'Donnell, Deceased, having filed in the Clerk's Office of the said District Court Notice of Appeal to the United States Circuit Court of Appeals for the Seventh Circuit, to reverse the Judgment of the aforesaid suit, in the United States Circuit Court of Appeals for the Seventh Circuit, to be holden at Chicago within forty (40) days from the date hereof

Now, the condition of the above obligation is such, that if the said Sarah O'Donnell, Administratrix of the Estate of William O'Donnell, Deceased, shall pay the costs if the appeal is dismissed or the said judgment affirmed, or pay such costs as the appellate court may

award if the said judgment is modified then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in presence of:

Sarah O'Donnell (Seal)
Administratrix of the Estate
of William O'Donnell, Deceased
Maryland Casualty Company,

Approved by:

By Philip Weinstein,
Attorney in Law.

432 And on the same day, to wit, the 1st day of March, 1948 came the Appellant by her attorneys and filed in the Clerk's office of said Court her certain Designation Of Portions Of The Record in words and figures following, to wit:

433 IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

• • (Caption—No. 46 C 1493) • •

DESIGNATION OF PORTIONS OF THE RECORD.

The Clerk of the District Court will include, in the Record on appeal, the following portions of the Record, proceedings and evidence in this cause:

1. Complaint filed August 29, 1946.
2. Motion to Dismiss, filed September 19, 1946.
3. Order Denying Said Motion, entered November 1, 1946.
4. Answer filed November 13, 1946.
5. Motion to Strike, filed November 20, 1946.
6. Order Granting Motion to Strike, filed February 18, 1947.
7. Order granting leave to plaintiff to file amended complaint and to withdraw portions of the complaint, and order denying motion to strike certain portions and amendments filed pursuant thereto.
8. All Orders entered on October 1, 1947.

9. Verdict and Judgment of October 2, 1947, and all other orders entered on said date.

10. Motion for Directed Verdict and Amendment to Complaint filed September 30, 1947.

11. Motion for New Trial and for Directed Verdict filed October 10, 1947.

434 12. Amendment to motion for new trial, and order entered thereon, dated October 22, 1947.

13. Orders denying motion for new trial and for directed verdict and entering judgment on verdict, dated December 12, 1947.

14. Transcript of Proceedings.

15. Copies of all exhibits introduced by both parties.

16. Notice of Appeal.

17. Appeal Bond.

18. Statement of Points on which appellant intends to rely, and this Designation.

19. All orders entered and papers filed after the date hereof.

Joseph D. Ryan
Attorney for Appellant

Received a copy of the above Designation of Portions of the Record this 1st day of March, A. D. 1948.

H. L. Hackbert,
Knapp, Cushing, Hershberger & Stevenson,
Attorneys for Defendant

435 And afterwards on, to wit, the 9th day of March, 1948 came the Parties by their attorneys and filed in the Clerk's office of said Court their certain Stipulation in words and figures following, to wit:

436 Appeal to the Circuit Court of Appeals for the Seventh Circuit from The United States District Court for the Northern District of Illinois Eastern Division

• • (Caption—No. 46 C 1493) • •

STIPULATION.

It Is Hereby Stipulated and Agreed by and between the parties hereto, by their respective attorneys, that the orig-

inal plaintiff's exhibits Nos. 1, 2, 3, 4, 5 and 6, and defendant's exhibits Nos. 1, 2, 4, 5 and 6 may be incorporated in the record on appeal in lieu of copies thereof.

It Is Further Stipulated and Agreed that the time within which the record on appeal shall be filed and docketed in the Circuit Court of Appeals may be extended to and including April 14, 1948.

It Is Further Stipulated and Agreed that the official court reporter may insert in the transcript of testimony on file in the Clerk's office seven (7) pages which were inadvertently omitted therefrom.

Joseph D. Ryan
Attorney for Plaintiff-Appellant

H. L. Hackbert,
Knapp, Cushing, Hershberger & Stevenson,
Attorneys for Defendant-Appellee.

437 And on the same day, to wit, on the 9th day of March, 1948, being one of the days of the regular March term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William J. Campbell District Judge, appears the following entry, to wit:

438

Appeal to the
Circuit Court of Appeals
For the Seventh Circuit from
The United States District Court for
The Northern District of Illinois
Eastern Division

Sarah O'Donnell, Administratrix of the Estate of William O'Donnell,
Plaintiff-Appellant
v.
Elgin, Joliet & Eastern Railway Company, a corporation,
Defendant-Appellee

No. 46 C-1493

ORDER.

Upon motion of the plaintiff, and pursuant to stipulation of the parties to this cause, It Is Ordered that the plaintiff's original exhibits Nos. 1, 2, 3, 4, 5 and 6,

and defendant's original exhibits Nos. 1, 2, 4, 5 and 6 may be incorporated in the record on appeal in lieu of copies thereof.

It Is Further Ordered that the time for filing the record on appeal and docketing the action in the Circuit Court of Appeals may be extended to and including April 14, 1948.

Leave Is Further Given the official court reporter to insert in the transcript of testimony on file in the office of the Clerk of this Court seven (7) pages which were inadvertently omitted therefrom.

Enter:

Campbell
Judge

Dated this 9th day of March, A. D. 1948.

439 Northern District of Illinois,
Eastern Division—ss.

I, Roy H. Johnson, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with the Designation filed in this Court in the cause entitled: Sarah O'Donnell, Administratrix of the Estate of William O'Donnell, Deceased, Plaintiff, v. Elgin, Joliet and Eastern Railway Company, a corporation, Defendant, No. 46 C 1493, as the same appear from the original records and files thereof now remaining among the records of the said Court in my office, except the Original Exhibits which are incorporated herein by direction of this Court.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 1st day of April, 1948.

Roy H. Johnson,
(Seal) Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

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I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed transcript of the record filed in this office on June 21, 1948, in:

Cause No. 9598.

Sarah O'Donnell, Administratrix of the Estate of William O'Donnell, Deceased,
*Plaintiff-Appellant,*

*vs.*

Elgin, Joliet and Eastern Railway Company,
*Defendant-Appellee,*

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 28th day of January, A. D. 1949.

Kenneth J. Carrick,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, held in the City of Chicago, and begun on the seventh day of October, in the year of our Lord one thousand, nine hundred and forty-seven, and of our Independence the one hundred-seventy-second.

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Sarah O'Donnell, Administratrix of the Estate of William O'Donnell, Deceased,
*Plaintiff-Appellant,*
*vs.*
Elgin, Joliet & Eastern Railway Company,
*Defendant-Appellee.*

No. 9598.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

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And afterward, to-wit, on the sixth day of April, 1948, there was filed in the office of the Clerk of this Court an appearance of counsel for the appellant, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

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Cause No. 9598.

Sarah O'Donnell, Administratrix of the Estate of William O'Donnell,
*Plaintiff-Appellant,*

*vs.*

Elgin, Joliet & Eastern Railway Company,
*Defendant-Appellee.*

The Clerk will enter our appearance as counsel for Appellant.

Joseph D. Ryan,
100 N. La Salle Street,
Chicago, Illinois.

Louis P. Miller,
100 N. La Salle Street,
Chicago, Illinois.

Endorsed: Filed Apr. 6, 1948. Kenneth J. Carrick, Clerk.

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And afterward, to-wit, on the tenth day of April, 1948, there was filed in the office of the Clerk of this Court an appearance of counsel for the appellee, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

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Cause No. 9598.

Sarah O'Donnell, Administratrix of the Estate of William O'Donnell,

*Plaintiff-Appellant,*

*vs.*

Elgin, Joliet & Eastern Railway Company,

*Defendant-Appellee.*

The Clerk will enter my appearance as counsel for Appellee.

Harlan L. Hackbert,
208 S. La Salle Street,
Chicago 4, Illinois.

Endorsed: Filed Apr. 10, 1948. Kenneth J. Carrick, Clerk.

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And afterward, to-wit, on the twenty-ninth day of October, 1948, the following further proceedings were had and entered of record, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Chicago 10, Illinois.

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October 29, 1948.

Before:

Hon. Otto Kerner, Circuit Judge.
Hon. Sherman Minton, Circuit Judge.
Hon. Charles G. Briggle, District Judge.

| | |
|---|---|
| Sarah O'Donnell, Administratrix of the Estate of William O'Donnell, Deceased, *Plaintiff-Appellant*, vs. Elgin, Joliet & Eastern Railway Company, *Defendant-Appellee*. | Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division. |
| No. 9598. | |

Now this day come the parties by their counsel and this cause comes on to be heard on the transcript of the record and the briefs of counsel, and on oral argument by Mr. Joseph D. Ryan, counsel for the appellant, and by Mr. Harlan L. Hackbert, counsel for the appellee, and the Court takes this matter under advisement.

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And afterward, to-wit, on the twenty-seventh day of December, 1948, there was filed in the office of the Clerk of this Court the opinion of the Court, which said opinion is in the words and figures following, to-wit:

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

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No. 9598. October Term and Session, 1948.

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SARAH O'DONNELL, Administratrix of the Estate of William O'Donnell,
*Plaintiff-Appellant,*
*vs.*
ELGIN, JOLIET & EASTERN RAILWAY COMPANY,
*Defendant-Appellee.*

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

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December 27, 1948.

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Before KERNER and MINTON, *JJ.*, and BRIGGLE, *District Judge.*

KERNER, *J.* Plaintiff-appellant, as administratrix of her deceased husband's estate, brought this action against defendant-appellee under the Federal Employers' Liability Act, 45 U.S.C.A. § 51, *et seq.*, to recover for her husband's death. She charged general negligence under the Act and a violation of the Safety Appliance Act, 45 U.S.C.A. § 2, which provides that "It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the car." Plaintiff tried her case upon the theory that her husband came to his death as the result of the breaking of a coupler. The issues left to the jury

were whether defendant violated the Safety Appliance Act and whether such alleged violation was the proximate caues of O'Donnell's death. The jury returned a verdict for defendant, and from a judgment based thereon, plaintiff appealed.

The decedent was a switchman employed by defendant and on the night he met his death was working in defendant's yards at Gary, Indiana. The decedent's brother was the conductor-foreman of a switching crew engaged in making up a train of cars on what was known as Track 5. In this yard the lead tracks and the terminal and rip tracks ran in a general east and west direction. Branching off from these tracks in a northeasterly direction were Tracks 1 to 6. From the latter tracks the switching crew was switching cars out upon the lead tracks. As the cars were sorted out on the leads, they were switched into the proper track. There were some 43 cars in on Track 5, filling it from the west to the east. The last three cars pushed in towards Track 5 did not couple to each other nor to the cut of cars already on that track. One car stood about a car length west of the cut, just at the point where a safety sign had been lowered. It was customary to raise this sign in warning when repairs were being made on the track and to fold it down between the rails when no warning was necessary. The other two cars stood west of the single car. The decedent and his brother were standing along Track 1 near the switch when decedent's brother told decedent he was going to pull some cars from Track 1 onto the lead track; the most easterly of these cars was to be switched into Track 5 and the others into another track. The decedent, in preparation for this movement, went to line up the couplings of the three cars that had not been coupled to the cut of cars on Track 5. This is the last time that he was seen alive.

The decedent's brother started the switching operation to put the car into Track 5. This operation, referred to as the first movement, took four or five minutes. This gave decedent sufficient time to walk to the uncoupled cars on the west end of Track 5 and attend to the lining up of the coupling. The cut of cars in the switching operation moving eastwardly toward Track 5, reached a speed of ten miles an hour. As it neared Track 5, decedent's brother gave two successive stop signals but, for some reason not apparent on the record, these signals were

not obeyed. The conductor then gave an emergency stop signal, and the cars came to a sudden stop. When the sudden stop was made, the coupler on the west end of the second car from the east end of the cut broke, allowing the two easterly cars to run free and collide under their momentum with the uncoupled cars on Track 5. The violent impact coupled the cars in succession as they moved eastwardly until the most easterly car was coupled to the most westerly car of the cut already on Track 5. This indicated that the decedent had by this time properly aligned the couplers as he had set out to do.

Shortly after the breaking of the coupler and the collision, decedent's brother proceeded along the north side of Track 5 eastwardly for about ten car lengths, examining the couplings to see if they had all been properly made. His examination was made by turning the light from his electric lantern upon each coupling as he passed along. In addition to his lantern light, the yard was lighted up by a flood light from the top of a coal chute to the southeast of Track 5. The floodlight cast the car's shadow towards the north. The cars extended two feet or more out over the rail. When decedent's brother satisfied himself that the couplings were made, he boarded the engine, rode around to the east end of the cut of cars on Track 5, coupled the engine, and moved the cars out east into the terminal yard.

After this movement, referred to as the second movement, decedent's brother returned to the switchmen's shanty and not finding decedent there, went out to the east end of Track 1 looking for him. Not finding decedent at that point, he returned to the shanty. About an hour had elapsed since decedent had been last seen, and his brother became alarmed. Again he went out, searching in the eastern part of the yard as decedent often rode the cars down to the east end when his work in the west part of the yard was completed. The engineer was walking west in the yard when decedent's brother met him and inquired if he had seen decedent. The engineer replied in the negative, and the two proceeded westwardly along the north side of Track 5 until about 15 car lengths east of the west switch on Track 5. The engineer continued westward along Track 5, and decedent's brother turned north to search again on Track 1. Finding no trace of decedent there, he turned back to Track 5 and proceeded westwardly

to about a car length east of the safety sign. The decedent's body was found there, lying north of the north rail, close up against it, the right arm and leg severed on the north rail, and the face cut off. The sign was lying flat between the rails with a fresh chip out of it. His lantern was found at the sign and brush marks continued eastward to the point where the body was found, indicating the body had been dragged eastward from the point of the sign about a car length or the distance of the last gap to be closed by the cars following the crash of the two cars that ran in after the coupler broke.

In her brief plaintiff admits there was no evidence that the coupler had failed to function previous to the accident, and that there was no evidence that defendant had failed to exercise ordinary care in respect to the maintenance of the coupler. Her theory was that decedent had been killed on the first movement when the coupler broke and that that is the only conclusion that could be reached from the facts proved.

On the other hand defendant contends that the jury may have concluded that decedent was killed on the second movement when the cars were pulled eastwardly on Track 5, otherwise decedent's brother would have discovered the body as he walked along the north side of Track 5 inspecting the couplings after the coupler broke and the two cars had crashed into Track 5; and since it was at least uncertain in which movement decedent was killed, and the jury, having considered the factual situation which was in its province, resolved the findings against plaintiff, the verdict should not be disturbed.

Thus it is clear that the question was one of fact. The jury is the tribunal to decide that type of issue, *Bailey* v. *Central Vermont Ry.*, 319 U. S. 350, 353, and while the jury was entitled to draw inferences from the evidence, nevertheless, plaintiff was required to present probative facts from which the negligence and causal relation could reasonably be inferred. *Tennant* v. *Peoria & P. U. Ry.*, 321 U. S. 29, 32. The choice of conflicting versions of the way the accident happened and the inferences to be drawn from uncontroverted as well as controverted facts, are questions for the jury. *Ellis* v. *Union Pacific R. R.*, 329 U. S. 649, 653.

In this case we cannot say that the evidence leads only to a conclusion other than that reached by the jury or that

the jury reached a verdict that has no basis in the evidence. We are not warranted in setting aside a verdict where there are two versions in the evidence or where the evidence is so uncertain that no definite conclusion can be reached therefrom. To resolve such factual situations is clearly the province of the jury. *Lavender* v. *Kurn*, 327 U. S. 645, and *United States* v. *Douglas Aircraft Co.*, 169 F. 2d 755.

Plaintiff complains of the court's instructions. The court, after instructing the jury that the Safety Appliance Act placed upon defendant the absolute duty to provide couplers coupling automatically by impact and which could be uncoupled without the necessity of men going between the ends of the cars, told the jury that they might find defendant guilty, if they believed that defendant had used and operated a car with a defective coupler, contrary to the provisions of the Act, and that the coupler broke, and that as a direct and proximate result thereof decedent sustained injuries which resulted in his death.

The record is devoid of any request by plaintiff that the jury be instructed that they might infer negligence from the breaking of the coupler, but in the District Court plaintiff contended for and tendered instructions upon the theory that a breaking of the coupler in and of itself was negligence *per se*. The court refused to so instruct.

While the duty resting upon defendant to furnish couplers that complied with the Safety Appliance Act was absolute, and it has been held that the statute should be liberally construed " 'so as to give a right of recovery for every injury the proximate cause of which was a failure to comply with a requirement of the Act,' " *Brady* v. *Terminal R. R. Association*, 303 U. S. 10, 15, we do not believe the Act required defendant to furnish couplers that would not break. We think the true rule is that where a coupler does break, the jury may, if they think it reasonable under all the circumstances, infer that the coupler was defective and was furnished and used in violation of the Act. The cases go no further than to hold that from the breaking of a coupler the jury may infer negligence. *New Orleans & N. E. R. R.* v. *Scarlet*, 249 U. S. 528; *Minn. & St. Louis R. R.* v. *Gotschall*, 244 U. S. 66; and *Vigor* v. *Chesapeake & O. Ry.*, 101 F. 2d 865. Permitting the jury to infer negligence from the breaking of the coupler with no other proof of negligence, as in the *Gotschall* case, is a

different thing from telling the jury they must find negligence from the breaking of the coupler. It is the difference between leaving the question to the jury and peremptorily instructing the jury to find for plaintiff.

In this connection it might be well to say that we cannot assume that had plaintiff requested that the jury be instructed that they might infer negligence from the breaking of the coupler, that the court would not have so instructed. Rather, we must assume the court would have so instructed. In this state of the record it cannot be said the court erred in refusing the instructions tendered. *Palmer* v. *Hoffman*, 318 U. S. 109; *Alaska Pacific Salmon Co.* v. *Reynolds Metals Co.*, 163 F. 2d 643; *Krug* v. *Mutual Accident Ass'n.*, 120 F. 2d 296, 301; *McDonald* v. *Jarka Corporation*, 144 F. 2d 53, 54; and *Blair* v. *Cullom*, 168 F. 2d 622.

Plaintiff next complains of an instruction that told the jury that the fact of an accident carries no presumption of negligence; that the evidence must point to the fact that defendant was guilty of negligence; that they could not guess between the various causes of the accident and find that the negligence charged was the proximate cause of the accident if there was no satisfactory foundation for such a conclusion. The objection is that this instruction required plaintiff to prove negligence apart from and in addition to the breaking of the coupler. Plaintiff says that this instruction confuses defendant's negligence with causal relation, or proximate cause, and directs the jury to guess and conjecture that there was no satisfactory foundation for the conclusion that the breaking of the coupler caused or proximately contributed to cause O'Donnell's death.

It is to be remembered that all the instructions must be considered together as one charge. The criticized instruction is directed to the question of proximate cause. It correctly cautioned the jury that they could not presume from the fact of the accident that O'Donnell was killed because of the breaking of the coupler. *Brady* v. *Southern Ry.*, 320 U. S. 476, 483.

Moreover, upon examination of all the instructions given, we find that the court correctly explained to the jury, the issues and the law applicable thereto. He told the jury that if they found the coupler did not comply with the requirements of the statute and that as a result

O'Donnell had been killed in the movement which followed, they could find defendant guilty. He distinctly and in express terms called attention to the three grounds of liability charged, and the statutes involved. He defined negligence, proximate cause, the preponderance of the evidence and instructed them as to the limited extent to which contributory negligence entered into the issues. Under these circumstances we do not believe that the instructions considered as a whole were erroneous.

The judgment of the District Court is affirmed.

MINTON, *Circuit Judge*, Concurring in part and dissenting in part. I concur in so much of the opinion as does not deal with the instructions. I think the instructions confused the jury and did not fully and correctly state the law. One cannot read this record, it seems to me, without reaching the conclusion that the evidence clearly preponderated in favor of the plaintiff, and the instructions misled the jury to a wrong result. I think the jury was confused and misled by the instructions into believing it could not infer negligence from the breaking of the coupler but had to find that the breaking of the coupler was a question of whether the defendant had used reasonable care in and about the furnishing and use of the coupler which broke. If the coupler broke, that under the circumstances might authorize the jury to infer negligence from the violation of the Safety Appliance Act.

The plaintiff made the following timely objections to the court's instructions:

> "Your Honor, the first thing I wish to suggest is this, that a violation of the Safety Appliance Act is in and of itself negligence. * * *"

The court gave the following instruction:

> "Now, if you believe from a preponderance of the evidence, and I will tell you what that means in a little while, under the instructions of the Court, that the defendant, at the time and place in question, used and operated a car with a defective coupler, contrary to the provisions of the Federal Safety Appliance Act, and that said coupler broke, and that as a direct and proximate result thereof, the plaintiff's decedent sustained injuries which resulted in his death, then you may find the defendant guilty."

While this instruction was substantially as requested by the plaintiff, it did not quite meet the plaintiff's request that the court instruct directly and positively that a violation of the Safety Appliance Act was negligence in and of itself. Since the plaintiff's exception to the court's instruction was a request that the court instruct fully on one of the most important legal questions in the case, the court should have complied with the plaintiff's specific request.

Not only should the court have specifically instructed that a violation of the Safety Appliance Act was in and of itself negligence without regard to the use of reasonable care, but the court should have further instructed the jury that it may infer negligence from the breaking of the coupler. *Minn. & St. Louis R. R.* v. *Gotschall,* 244 U. S. 66, 37 S. Ct. 598, 61 L. Ed. 995. To this failure to instruct, the plaintiff, however, did not object. I am aware that under Rule 51 of the Federal Rules of Civil Procedure, 28 U. S. C. A. foll. Sec. 723c, and the well-settled federal practice, an instruction is precluded from review on appeal unless the party urging review has objected there to before the jury has retired and has stated "distinctly the matter to which he objects and the grounds of his objection." *United States* v. *Atkinson,* 297 U. S. 157, 56 S. Ct. 391, 80 L. Ed. 555; *Krug* v. *Mutual Accident Ass'n.,* 120 F. 2d 296. Although neither side requested the Court to instruct the jury that it might draw an inference of negligence from the mere breaking of the coupler and the plaintiff did not object that such an instruction, which is the correct rule governing this case, was not given, I do not think, under the circumstances here presented, that Rule 51 requires us not to notice this omission. The breaking of the coupler is the fact which raises the most important question of law in this case. The plaintiff timely and distinctly objected to the court's failure to instruct that the breaking was in and of itself negligence. While this objection was predicated upon an incorrect conception of the law, it was sufficient to direct the attention of the court and place it under duty to instruct on the law properly applicable to this crucial fact. *Memphis Press-Scimitar Co.* v. *Chapman,* 62 F. 2d 565.

The Court gave the following instruction to which the plaintiff did properly object:

"Now, as I have told you in the beginning, the fact of an accident carries with it no presumption of negli-

gence on the part of the defendant. That is an affirmative fact for the plaintiff to prove. Plaintiff must prove that the defendant has been guilty of negligence as alleged in the plaintiff's complaint, one of these three things that I have been enumerating to you. It is not sufficient for the plaintiff to show that the defendant may possibly have been guilty of negligence."

This instruction, given in a case where only common law negligence is considered, may be appropriate, but such principle is held "not controlling in view of the positive duty imposed by the statute upon the railroad to furnish safe appliances for the coupling of cars." *Minn. & St. Louis R. R.* v. *Gatschall, supra,* at p. 67.

Webster defines "presumption" as:

* * *

"That which is presumed, or supposed or believed on evidence that is probable, but not conclusive * * *.

"An inference as to the existence of one fact not certainly known, from the known or proved existence of some other fact, founded on a previous experience or general knowledge of their connection * * *." Webster's New International Dictionary Second Edition, Unabridged.

The common definition of presumption is the equivalent of inference. The court's instructions, in effect, told the jury that it could not infer negligence from the happening of the accident, namely, the breaking of the coupler. Instead of instructing the jury that it might infer negligence from the breaking of the coupler, the court told the jury it could not infer negligence from the happening of the accident. This was error. Two kinds of negligence were charged in the complaint, namely, the general charge of a failure to use due care and the violation of a statute. To give the latter instruction without strictly limiting it to the general charge of negligence was calculated to mislead the jury in its right to infer negligence from the breaking of the coupler and thus find a violation of the Safety Appliance Act. This was a jury question under all the authorities.

For failure of the court to instruct the jury fairly and fully, the judgment of the District Court should be reversed.

And on the same day, to-wit, on the twenty-seventh day of December, 1948, the following further proceedings were had and entered of record, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

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Monday, December 27, 1948.

Before:

Hon. Otto Kerner, Circuit Judge.
Hon. Sherman Minton, Circuit Judge.
Hon. Charles G. Briggle, District Judge.

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| Sarah O'Donnell, Administratrix of the Estate of William O'Donnell, Deceased, *Plaintiff-Appellant*, vs. Elgin, Joliet & Eastern Railway Company, *Defendant-Appellee*. No. 9598. | Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division. |

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby affirmed, with costs.

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And afterward, to-wit, on the eleventh day of January, 1949, there was filed in the office of the Clerk of this Court, a petition for rehearing, which petition is not copied here.

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And afterward, to-wit, on the twenty-first day of January, 1949, there was filed in the office of the Clerk of this Court, an answer to the petition for rehearing, which answer is not copied here.

And afterward, to-wit, on the twenty-second day of January, 1949, the following further proceedings were had and entered of record, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Chicago 10, Illinois.

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January 22, 1949.

Before:

Hon. Otto Kerner, Circuit Judge.
Hon. Sherman Minton, Circuit Judge.
Hon. Charles G. Briggle, District Judge.

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|---|---|
| Sarah O'Donnell, Administratrix of the Estate of William O'Donnell, Deceased, *Plaintiff-Appellant,* vs. Elgin, Joliet & Eastern Railway Company, *Defendant-Appellee.* | Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division. |
| No. 9598. | |

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, denied.

And on, to-wit, on the tenth day of July, 1948, there was filed in the office of the Clerk of this Court a notice, motion and stipulation which said notice, motion and stipulation are in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 9598

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|---|---|
| Sarah O'Donnell, administratrix of the estate of William O'Donnell, deceased, *Plaintiff-Appellant,* *vs.* Elgin, Joliet & Eastern Railway Company, *Defendant-Appellee.* | Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division. Honorable William J. Campbell, Judge Presiding. |

NOTICE.

To: Messrs. Knapp, Cushing, Hershberger & Stevenson,
208 South La Salle Street,
Chicago, Illinois.

You Are Hereby Notified that appellant will forthwith file in the Office of the Clerk of the United States Circuit Court of Appeals, Seventh Circuit, a motion to extend the time for filing appellant's brief to and including August 18th, 1948, and the filing of appellee's brief to and including September 28th, 1948, and the filing of appellant's reply brief to and including October 12th, 1948, and the stipulation of the parties herein, copies of which motion and stipulation are hereto attached.

Joseph D. Ryan,
*Attorney for Plaintiff.*

Received a copy of the above and foregoing notice, motion and stipulation this 9th day of July, A. D. 1948.

Knapp, Cushing, Hershberger
and Stevenson, and
H. L. Hackbert,
*Attorneys for Defendant.*

Approved & so ordered, ; 8. William M. Sparks, J.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 9598

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|---|---|
| Sarah O'Donnell, administratrix of the estate of William O'Donnell, deceased,<br>*Plaintiff-Appellant,*<br>*vs.*<br>Elgin, Joliet & Eastern Railway Company,<br>*Defendant-Appellee.* | Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.<br>Honorable William J. Campbell, Judge Presiding. |

## MOTION.

Comes now Sarah O'Donnell, administratrix of the estate of William O'Donnell, deceased, by Joseph D. Ryan, her attorney, and moves for leave to extend the time for filing briefs herein as follows:

Appellant's brief to and including August 18th, 1948; appellee's brief to and including September 28th, 1948, and appellant's reply brief to and including October 12th, 1948, and appellant also moves for leave to include as an appendix to her brief, the refused requests for instructions tendered by both plaintiff and defendant on the trial of this cause, and inadvertently omitted from the transcript, and in support of this motion, plaintiff presents the stipulation of the parties hereto.

Joseph D. Ryan,
*Attorney for Plaintiff.*

Joseph D. Ryan,
100 North La Salle,
Chicago, Illinois,
Franklin 5124.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 9598

| | |
|---|---|
| Sarah O'Donnell, administratrix of the estate of William O'Donnell, deceased, *Plaintiff-Appellant,* *vs.* Elgin, Joliet & Eastern Railway Company, *Defendant-Appellee.* | Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division. — Honorable William J. Campbell, Judge Presiding. |

STIPULATION.

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the time for filing appellant's brief herein may be extended to and including August 18th, 1948; that the time for filing appellee's brief herein may be extended to and including September 28th, 1948, and the time for filing appellant's reply brief herein may be extended to and including October 12th, 1948.

It is further stipulated and agreed that additional transcript of record, consisting of eighteen (18) typewritten pages and composed of plaintiff's refused requests Numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15, and defendant's refused requests Numbers 1, 2, 3, 4, 5, 6, 7, 8 and 9, may be filed as a part of the record in the Circuit Court of Appeals herein and may be printed as an appendix to appellant's brief.

Joseph D. Ryan,
*Attorney for Plaintiff.*

Knapp, Cushing, Hershberger & Stevenson,
Harlan L. Hackbert,
*Attorneys for Defendant.*

Endorsed: Filed July 10, 1948. Kenneth J. Carrick, Clerk.

And on, to-wit, on the thirteenth day of July, 1948, the following further proceedings were had and entered of record, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Chicago 10, Illinois.

July 13, 1948

Before:

Hon. William M. Sparks, Circuit Judge.

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|---|---|
| Sarah O'Donnell, Administratrix of the Estate of William O'Donnell, Deceased, *Plaintiff-Appellant,* vs. Elgin, Joliet & Eastern Railway Company, *Defendant-Appellee.* | Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division. |

9598

On motion of counsel for the plaintiff-appellant and pursuant to stipulation of counsel, it is ordered that the time for filing the appellant's brief be extended to August 18, 1948, the time for filing the appellee's brief be extended to September 28, 1948, and the time for filing the appellant's reply brief be extended to October 12, 1948.

It is further ordered that leave be granted to the plaintiff-appellant to include as an appendix to her brief the refused requests for instructions tendered by both plaintiff and defendant on the trial of this cause, which said requests were inadvertently omitted from the transcript of record.

And on, to-wit, on the eighteenth day of August, 1948, there was filed in the office of the Clerk of this Court a brief for appellant including appendix thereto which said appendix to brief for appellant, consisting of refused requests for instructions tendered by counsel is in the words and figures following, to-wit:

## APPENDIX TO BRIEF FOR APPELLANT

## FILED AUG. 18, 1948.

IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois,

Eastern Division.

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| Sarah O'Donnell, Administratrix of the Estate of William O'Donnell, deceased, *Plaintiff*, *vs.* Elgin, Joliet and Eastern Railway Company, a corporation, *Defendant*. | No. 46 C 1493. |

And thereupon at the conclusion of all the evidence plaintiff tendered the following instructions and requested that the same be given to the jury, the said instructions having been filed September 30th, 1947:

Plaintiff's Proposed Instruction No. 1

It is alleged in the plaintiff's complaint that on January 9, 1946, the plaintiff's decedent and the defendant, Elgin, Joliet & Eastern Railway Company, a corporation, at the time of the injury and death hereinafter complained of, were engaging in interstate commerce and transportation in a certain railroad yard in the County of Lake and State of Indiana; that at said time and place both the decedent and the defendant became and were subject to the provisions of the Federal Employers' Liability Act and the Federal Safety Appliance Act.

It is further alleged in said complaint that at said time and place it became and was the duty of plaintiff's decedent

to open the knuckle or knuckles on a certain car or cars which had failed to couple automatically by impact on track No. 5 in said yard; that while the said decedent was attempting to adjust one of the said couplers and was between the cars in a position of danger, the defendant, pursuant to the order of its foreman or conductor, propelled a certain cut of cars in an easterly direction toward the cars standing on said track No. 5 aforesaid; that at said time and place the defendant, by its servants:

Negligently propelled and impacted two or more of the said cut of cars upon and against the said standing cars where plaintiff's decedent was at work, as aforesaid.

Negligently failed to equip and maintain the cars on track No. 5 with couplers which would couple automatically by impact, without the necessity of men going between the ends of said cars, contrary to the provisions of the Federal Safety Appliance Act.

Negligently failed to equip and maintain on one of the cars being moved along the said track, a safe and efficient coupler which would remain coupled to the car to which it was attached, but which, on the contrary was so defective and insecure that it broke loose from said car, contrary to the provisions of the Federal Safety Appliance Act.

It is further alleged in said complaint that as a direct and proximate result of the negligence of the defendant, as aforesaid, the said cars were caused to run violently upon and over the plaintiff's decedent and he thereby sustained injuries and damages which resulted in his death, on said date.

It is further alleged in said complaint that said decedent left surviving his widow, Sarah O'Donnell, Elizabeth and Marlene, his daughters, and William and Richard, his sons, all of whom are living and by reason of the death of said decedent have been deprived of their means of support and have sustained pecuniary loss and damage.

If you believe from a preponderance of the evidence, under the instructions of the court, that the plaintiff has proved the allegations of her complaint as above set forth and that the defendant's failure to comply with the provisions of the said Federal Safety Appliance Act, if it did so fail, proximately caused or proximately contributed to cause the injury and death complained of by the plaintiff in this case, then you should find the defendant guilty.

Plaintiff's Proposed Instruction No. 2.

The jury are instructed that it is provided by an Act of Congress, which was in force as the law at the time the decedent was killed, that every common carrier by railroad, while engaging in commerce between any of the several states of the United States, shall be liable in damages to any person suffering injury or death while he is employed by such carrier in such commerce, from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.

It is further provided by this act that no employee who may be injured or killed while engaging in interstate commerce shall be held to have been guilty of contributory negligence in any case where the violation by such carrier of the Federal Safety Appliance Act proximately caused or proximately contributed to cause such injury or death.

Plaintiff's Proposed Instruction No. 3.

The court instructs you as a matter of law that under the evidence in this case and the stipulation agreed upon between the parties in this case, both the plaintiff's decedent and the defendant were engaging in interstate commerce and were subject to the provisions of the Federal Employers' Liability Act and the Federal Safety Appliance Act.

Plaintiff's Proposed Instruction No. 4.

The court instructs the jury that it was the absolute duty of the defendant, under the provisions of the Federal Employers' Liability Act and the Federal Safety Appliance Act, to have all cars used in the prosecution of its interstate business equipped with safe and efficient couplers that would at all times couple automatically by impact without the necessity of men going between the cars and which would remain coupled while said cars were being operated.

Plaintiff's Proposed Instruction No. 5.

You are further instructed that if you believe from a preponderance of the evidence, under the instructions of the court, that the defendant, at the time and place in question, used and operated a car with a defective coupler, contrary to the provisions of the Federal Safety Appliance Act, and

that said coupler broke and that as a direct and proximate result thereof, the plaintiff's decedent sustained injuries which resulted in his death, then you should find the defendant guilty and negligence, or contributory negligence on the part of the decedent, if any, is entirely immaterial and does not affect the plaintiff's right to recover in this case.

Plaintiff's Proposed Instruction No. 6.

The court instructs you that the defendant was under an absolute duty to equip and maintain its cars with properly functioning coupling devices and any violations of its duty to so equip and maintain its cars which proximately caused or proximately contributed to cause the injury and death of decedent rendered the said defendant liable in this case as a matter of law.

Plaintiff's Proposed Instruction No. 7.

You are instructed that if you believe from a preponderance of the evidence, under the instructions of the court, that the breaking of the coupler in question was the proximate cause or a proximately contributing cause of the injury and death herein complained of, then you should find the defendant guilty; and you are further instructed that in such event contributory negligence, if any, on the part of the decedent does not in any way affect defendant's liability and should not be considered by you in arriving at your verdict.

Plaintiff's Proposed Instruction No. 8.

If you believe from a preponderance of the evidence, under the instructions of the court, that the plaintiff's decedent went between said cars on track No. 5 for the purpose of opening a knuckle on one of the cars standing thereon, so that the same could be coupled to other cars standing on said track, and that while he was thus engaged the coupler on one of a string of cars which was being propelled eastward toward said track No. 5 broke, thereby causing the two leading cars of said string of cars to become detached and to then and there run upon and against the cars standing on said track No. 5, as aforesaid, with force and violence while plaintiff's decedent was engaged, as aforesaid, and that he thereby received injuries which resulted in and caused his death, then you should find the defendant guilty.

Plaintiff's Proposed Instruction No. 9.

The degree of proof required of the plaintiff in this case is that she prove her case by a preponderance of the evidence. This means that upon the questions of fact which the plaintiff is required to prove she must have a greater weight, or preponderance, of evidence. But this rule does not require the plaintiff to prove any fact beyond a reasonable doubt; a fact is sufficiently proved if the jury find the greater weight of the evidence is in its favor.

Plaintiff's Proposed Instruction No. 10.

While the plaintiff must prove her case by a preponderance of the evidence, still the proof need not be the direct evidence of persons who saw the occurrence or things sought to be proved, but facts may also be proved by circumstantial evidence, that is, by proof of circumstance, if any, such as give rise to a reasonable inference in the minds of the jury of the truth of the facts alleged and sought to be proved, provided such circumstances, together with all the other evidence bearing on such facts, constitute a preponderance of evidence.

Plaintiff's Proposed Instruction No. 11.

The jury are instructed that in determining what facts are proved in this case they should carefully consider all the evidence before them, with all the circumstances of the transaction in question as detailed by the witnesses; and they may find any fact to be proved which they think may be rightfully and reasonably inferred from the evidence given in the case, although there may be no direct evidence or testimony as to such fact.

Plaintiff's Proposed Instruction No. 12.

The jury are the sole judges of the credibility of the witnesses and of the weight and credit to be given to their testimony. In determining the question as to the weight and credit you will give to the testimony of the several witnesses, you are at liberty to take into consideration the interest of the witnesses, or any of them, in the result of your verdict, if any; their relationship to the parties in interest, if any; their intelligence; their means or opportunity of knowing the truth of the matters about which they testify; the reasonableness or unreasonableness of their statements, and

the extent to which they are corroborated by other witnesses, if at all, and the apparent inclination of the witnesses to speak the truth, or otherwise, regarding the matters within the knowledge of such witnesses. You may consider the appearance and demeanor of the several witnesses, while giving their testimony, and observe and take into consideration the candor and fairness with which they testify, or the lack thereof, and determine yourselves, under the instructions of the court, the weight or credit to be given to the testimony of the several witnesses.

Plaintiff's Proposed Instruction No. 13.

The term "proximate cause" wherever used in these instructions means that cause which of itself or in combination with other causes, in natural and continuous sequence, unbroken by any efficient intervening cause, produced the result complained of and without which the result would not have occurred. It need not be the sole cause, nor the last or nearest cause; it is sufficient if it concurs with some other cause acting at the same time, which in combination with it causes the injury.

Plaintiff's Proposed Instruction No. 14.

The jury are instructed that they, under the instructions of the court and from the evidence, are the sole judges of all the questions of fact in this case, and the court does not, by any instructions given the jury in this case, intend to instruct the jury how they should find any question of fact.

Plaintiff's Proposed Instruction No. 15.

The court instructs the jury that if, from a preponderance of the evidence and under the instructions of the court, you find the issues for the plaintiff, then in assessing the damages, if any, you have a right to take into consideration all the testimony bearing upon that question and allow such damages as you may deem a fair and just compensation with reference to pecuniary injuries, if any, resulting from the death of the decedent to his widow and minor children, and in assessing plaintiff's damages, you have a right to take into consideration whatever, if anything, you may believe from the evidence his widow and minor children might reasonably have received from the decedent in a pecuniary way during the remainder of his life, if the decedent had not been killed.

And thereupon at the conclusion of all the evidence the defendant tenders the following instructions and requested that the same be given to the jury, the said instructions having been filed September 30th, 1947:

Defendant's Proposed Instruction No. 1.

You are further instructed that you are not permitted to guess, conjecture or speculate as to which movement of cars on track 5 caused the death of William O'Donnell, and if after considering all the evidence you are unable to find from the evidence which of said movements caused his death, then you shall find the defendant not guilty.

Defendant's Proposed Instruction No. 2.

The court instructs you that the fact of accident carries with it no presumption of negligence on the part of the defendant, but it is an affirmative fact for the plaintiff to prove that the defendant has been guilty of negligence as alleged in plaintiff's complaint. It is not sufficient for the plaintiff to show that the defendant may possibly have been guilty of negligence. The evidence must point to the fact that it was guilty of such negligence and if you believe from all of the testimony that the matter is uncertain and it shows that William O'Donnell may have been killed in the course of the final movement of cars out of track 5 rather than the movement in the course of which the coupler broke, you have no right to guess between these various causes and find that the negligence of the defendant was the proximate cause of the accident if there is no satisfactory foundation in the testimony for that conclusion.

Defendant's Proposed Instruction No. 3.

The jury are the sole judges of the credibility of the witnesses and of the weight and credit to be given to their testimony. In determining the question as to the weight and credit you will give to the testimony of the several witnesses, you are at liberty to take into consideration the interest of the witnesses, or any of them, in the result of your verdict, if any; their relationship to the parties in interest, if any; their intelligence; their means or opportunity of knowing the truth of the matter about which they testify; the reasonableness or unreasonableness of their statements, and the extent to which they are corroborated

by other witnesses, if at all, and the inclination of the witnesses to speak the truth, or otherwise, regarding the matters within the knowledge of such witnesses. You may consider the appearance and demeanor of the several witnesses, while giving their testimony, and observe and take into consideration the candor and fairness with which they testify, or the lack thereof, and determine yourself the weight or credit to be given to the testimony of the several witnesses.

Defendant's Proposed Instruction No. 4.

You are instructed that it was the duty of William O'Donnell at the time and place of the accident in question to exercise ordinary and reasonable care for his own safety and protection, and if you believe from the evidence that he failed to exercise such care, and you further believe from the evidence that such failure on his part to exercise ordinary and reasonable care for his own safety was the sole cause of the accident resulting in his death, then you are instructed that the plaintiff is not entitled to recover in this case and the verdict should be for the defendant.

Defendant's Proposed Instruction No. 5.

You are instructed that the burden is upon the plaintiff to prove by the greater weight of the evidence that at the time and place of the accident in question part of the duties of William O'Donnell was the furtherance of interstate commerce or directly or closely and substantially affected interstate commerce, and if the plaintiff has failed to prove by the greater weight of the evidence that at the time and place of the accident in question part of his duties was the furtherance of interstate commerce or directly or closely and substantially affected such commerce, then your verdict should be for the defendant.

Defendant's Proposed Instruction No. 6.

The fact that the Court has given any instruction on the subject of the plaintiff's damage or that the defendant's counsel has discussed the same subject, is not to be taken by you as any indication by the court or as any admission by the defendant of the defendant's liability.

Defendant's Proposed Instruction No. 7.

You are instructed that a plaintiff is required by law to prove her case by a preponderance of the evidence before she can recover. If the plaintiff in this suit has not so proved her case, or if the evidence is evenly balanced, or if you are unable to say on which side is the preponderance of the evidence, or if the evidence preponderates in favor of the defendant, your verdict shall be for the defendant.

Defendant's Proposed Instruction No. 8.

You are instructed that the plaintiff in this case charges in her complaint that the defendant was guilty of some one or more of the following acts of negligence:

(1) Carelessly and negligently propelled and impacted two or more of the said cut of cars upon and against the cars projecting out on the west rip lead at the place aforesaid.

(2) Carelessly and negligently failed to equip and maintain on the cars standing on No. 5 rip track, couplers which would couple automatically by impact without the necessity of men going between the ends of cars, contrary to the provisions of the Safety Appliance Act.

(3) Carelessly and negligently failed to equip and maintain on one of the cars being moved along the west rip track, couplers which would couple automatically by impact, contrary to the provisions of the Safety Appliance Act.

(4) Carelessly and negligently failed and neglected to warn decedent, who was in a place of obvious danger, should the cars on No. 5 rip track be moved, of the impending movement of cars along the west rip lead and against the cars standing on No. 5 rip track.

(5) Carelessly and negligently failed and neglected to exercise ordinary care to provide the decedent with a reasonably safe place in which to work.

Unless you believe from a preponderance of the evidence in this case, first, that the defendant was guilty of one or more of the acts of negligence as charged, and second, that such negligence was the proximate cause of the death of William O'Donnell, your verdict should be for the defendant.

Defendant's Revised Instruction No. 9.

Filed October 1, 1947.

You are instructed that the plaintiff in this case charges in her complaint that the defendant was guilty of some one or more of the following acts of negligence:

(a) Negligently propelled and impacted two or more of the said cut of cars upon and against the said standing cars where plaintiff's decedent was at work, as aforesaid.

(b) Negligently failed to equip and maintain the cars on track No. 5 with couplers which would couple automatically by impact, without the necessity of men going between the ends of said cars, contrary to the provisions of the Federal Safety Appliance Act.

(c) Negligently failed to equip and maintain on one of the cars being moved along the said track, a safe and efficient coupler which would remain coupled to the car to which it was attached, but which, on the contrary was so defective and insecure that it broke loose from said car, contrary to the provisions of the Federal Safety Appliance Act.

Unless you believe from a preponderance of the evidence in this case, first that the defendant was guilty of one or more of the acts of negligence as charged, and second, that such negligence was the proximate cause of the death of William O'Donnell, your verdict should be for the defendant.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

---

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten pages contain a true copy of papers filed and proceedings had (except motions and orders relating to filing of record and briefs, the briefs of counsel, the Petition for Rehearing and the Answer thereto) in:

Cause No. 9598.

Sarah O'Donnell, Administratrix of the Estate of William O'Donnell, Deceased,
*Plaintiff-Appellant,*

*vs.*

Elgin, Joliet and Eastern Railway Company,
*Defendant-Appellee,*

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 28th day of January, A. D. 1949.

(Seal)

Kenneth J. Carrick,
*Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

---

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 13, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, [redacted] 1949

No. [redacted] 56

SARAH O'DONNELL, Administratrix of the Estate of WILLIAM O'DONNELL, Deceased,
Petitioner,

vs.

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,
Respondent.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948.

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**No.**

---

**SARAH O'DONNELL, Administratrix of the Estate of WILLIAM O'DONNELL, Deceased,**

Petitioner,

VS.

**ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,**

Respondent.

---

## PETITION FOR WRIT OF CERTIORARI.

---

To The Honorable The Supreme Court
Of The United States:

The petitioner, Sarah O'Donnell, Administratrix of the Estate of William O'Donnell, Deceased, respectfully petitions this Honorable Court as follows:

1. To review the judgment of the Court of Appeals for the Seventh Circuit in the above case, which judgment was entered on December 27, 1948, and became final upon the denial by that court of petitioner's application for a rehearing on January 22, 1949 (R. 252, 253).*

---

* Where the letter R. appears, we refer to the page of the printed Transcript of Record.

2. For a Writ of Certiorari to the Court of Appeals for the Seventh Circuit, for that purpose.

In this behalf, petitioner shows:

## I.

## Opinion Below.

The opinion delivered in the court below is reported at 171 F. 2d. 973; it will also be found at R. 243-251.

## II.

## Summary and Short Statement of the Matter Involved.

This is an action brought under the Employers' Liability Act and the Safety Appliance Act to recover for the wrongful death of William O'Donnell, petitioner's decedent. He came to his death on the night of January 9th, 1946, during switching movements, while making up a train on track 5 in the Kirk yard of the defendant at Gary, Indiana. The facts are undisputed, and the jury were instructed as a matter of law that the Employers' Liability Act was applicable (R. 186). Mr. O'Donnell left surviving his widow, the petitioner, and four minor children (R. 116).

There were no eye-witnesses to the fatal accident. The decedent, a member of a switching crew, had told his brother, the conductor, a few minutes before, that he intended to adjust the couplers at two openings between the cars standing on track 5 (which had previously failed to couple by impact) so that they later could be coupled. The more westerly opening or gap extended east approximately 45 feet from a safety sign lying between the rails of track 5; at the east end of this opening was a standing car, and next to that a smaller opening. Shortly after

this conversation (two to four minutes), during an eastward movement on the lead track a coupler on the west end of the second car from the east broke in two because of an apparently old fracture (R. 92, 47) permitting these two cars to run wild; they impacted against certain cars standing the lead which were propelled against the cars on track 5, where decedent had announced his intention of working, and moved these cars a sufficient distance to close the openings and, incidentally, to couple the cars (which could not have occurred had the decedent not adjusted the couplers at the openings). Decedent was not seen alive from the time he started walking toward track 5 for the purpose stated. After the cars were pulled out to the east his body was found lying across the north rail of track 5 against the rail, his right arm over it and severed; a fresh chip had been knocked out of the safety sign and drag marks between the rails extended from the sign a distance of about 45 feet eastwardly to the point where the body was found. His lantern was found at the safety sign with its handle severed. Foot marks (R. 52, 54, 106, 107) were also found there which, in conjunction with the brush marks, proved almost conclusively that decedent had just adjusted the coupler at the west end of the westerly opening and was in the center of the track at that point when he was run over and killed.

The complaint charged general negligence (R. 5) and a violation of the Safety Appliance Act in that the coupler in question was so defective and insecure that it broke loose from the car to which it was attached (R. 13).

The factual contention of the defense was that instead of being killed on the movement when the coupler was broken, decedent might have been killed by a later movement on that same track, when the cars standing on it

were pulled out. This defense is not supported by any probative evidence or legitimate inference. It is pure speculation. It was, however, the only question in the case which could properly have been submitted to the jury. The defendant also contended that the Safety Appliance Act was not applicable, and that the plaintiff could not recover unless it appeared that the defendant had failed to use ordinary and reasonable care with respect to the coupler.

The plaintiff requested that the court charge that the maintenance of the car with a coupler which broke on an ordinary movement was a violation of the Safety Appliance Act, and was therefore negligence *per se*. This request the court refused (R. 193, 194).

In lieu of such request, the court charged the jury in the language of the Safety Appliance Act, leaving it to them to determine whether the breaking of the coupler was a violation of that Act (R. 186, 188).

The court, over plaintiff's objection, permitted counsel for the defendant to argue to the jury that the only duty the railroad owed, with respect to its couplers, was the duty of ordinary care, and that if the couplers coupled automatically by impact there was no violation of the Safety Appliance Act, although the coupler broke (R. 158, 159). Counsel also argued (R. 156) that plaintiff was required to prove that decedent's death resulted from the fault or negligence of the railroad company.

In instructing the jury, the court charged them as follows (R. 189):

> "Plaintiff must prove that the defendant has been guilty of negligence as alleged in the plaintiff's complaint, one of these three things that I have been enumerating to you. It is not sufficient for the plaintiff to show that the defendant may possibly have

been guilty of negligence. The evidence must point to the fact that it was guilty of such negligence, and if you believe from all of the testimony that the matter is uncertain and it shows that William O'Donnell may have been killed in the course of the final movement of cars out of track 5 rather than the movement in the course of which the coupler broke, you have no right to guess between these various causes and find that the negligence of the defendant was the proximate cause of the accident if there is no satisfactory foundation in the testimony for that conclusion."

This charge was not limited to the general negligence count, but, as given, was applicable to both counts.

The court further charged the jury as follows:

"The mere happening of an accident by which the plaintiff's intestate or plaintiff's decedent lost his life does not in and of itself create a liability upon the defendant to pay for it (R. 187). • • • Now, as I have told you in the beginning, the fact of an accident carries with it no presumption of negligence on the part of the defendant. That is an affirmative fact for the plaintiff to prove" (R. 189).

This charge, also, was not limited to the general negligence count, but, as given, was applicable to both counts.

## III.

### Jurisdictional Statement.

This Court's jurisdiction is invoked under New Title 28, United States Code, Judiciary and Judicial Procedure, Section 1254.

The judgment is a decision as to rights, privileges and immunities specially set up or claimed by petitioner under United States Statutes, the Federal Employers' Liability Act, 45 U.S.C.A., Sections 51-60, and the Federal Safety Appliance Act, 45 U.S.C.A. Section 2.

## IV.

## The Questions Presented.

The ultimate questions to be decided in this case are the following:

1. If a coupler breaks in two while in normal use, is such defect a violation of the Safety Appliance Act, and therefore negligence *per se*?

2. What is the duty of the carrier in respect to couplers? Is it bound absolutely to furnish couplers which will not break under ordinary usage?

3. In a suit grounded on a violation of the Safety Appliance Act by the breaking of a coupler, where the evidence is uncontradicted, may the trial court instruct the jury on the Safety Appliance Act by merely reading them the text of the Act, leaving to them not only its application, but its construction as well (bearing in mind that although the Act only requires couplers which will couple automatically by impact, this court has construed the Act as imposing on the railroads a positive duty to furnish safe appliances)?

4. In a suit grounded on a violation of the Safety Appliance Act through the breaking of a coupler, may counsel be permitted to argue to the jury, with the court's approval, that the only duty the railroad owed, with respect to its couplers, was the duty of ordinary care, and that if the couplers coupled automatically by impact there was no violation of the Act?

5. Where a complaint contains two charges of negligence, one based on a Safety Appliance Act violation, in that the coupler was defective and failed to remain coupled (not that it could not be coupled and uncoupled

automatically), and the other based on general negligence, may the court instruct the jury as follows, without restricting the instruction to the charge of general negligence?

> "The mere happening of an accident by which the plaintiff's intestate or plaintiff's decedent lost his life does not in and of itself create a liability upon the defendant to pay for it. * * * Now, as I have told you in the beginning, the fact of an accident carries with it no presumption of negligence on the part of the defendant. That is an affirmative fact for the plaintiff to prove."

6. Where a complaint contains two charges of negligence, one based on a Safety Appliance Act violation and the other based on general negligence, may the court instruct the jury as follows:

> "Plaintiff must prove that the defendant has been guilty of negligence as alleged in the plaintiff's complaint, one of the three things that I have been enumerating to you. It is not sufficient for the plaintiff to show that the defendant may possibly have been guilty of negligence. The evidence must point to the fact that it was guilty of such negligence, and if you believe from all of the testimony that the matter is uncertain and it shows that William O'Donnell may have been killed in the course of the final movement of cars out of track 5 rather than the movement in the course of which the coupler broke, you have no right to guess between these various causes and find that the negligence of the defendant was the proximate cause of the accident if there is no satisfactory foundation in the testimony for that conclusion."

**Reasons Relied Upon for Allowance of the Writ.**

Great uncertainty exists as to the proper construction and effect of the Safety Appliance Act, by reason of this court's decisions in *Minneapolis and St. L. R. Co.* v. *Got-*

*schall,* 244 U. S. 66; *San Antonio Ry. Co.* v. *Wagner,* 241 U. S. 476; *St. Louis, I. M. & Southern Ry. Co.* v. *Taylor,* 210 U. S. 281, and *New Orleans and N. E. R. R. Co.* v. *Scarlet,* 249 U. S. 528. This court in the *Taylor* case, in *Chicago, Burlington and Quincy Ry. Co.* v. *United States,* 220 U. S. 559, 575; *Delk* v. *St. Louis and San Francisco R. R. Co.,* 220 U. S. 580, 586, and *Texas and Pacific Ry. Co.* v. *Rigsby,* 241 U. S. 33, 43, held that the duty of the carrier to furnish cars complying with the Safety Appliance Act was absolute. In the *Gotschall* case the court referred to the positive duty to furnish safe appliances. In the *Wagner* case the court pointed out the legislative intent to treat a violation of the Safety Appliance Act as negligence *per se.* Yet in the *Scarlet* case the court held that the breaking of a king pin and coupling chains in an ordinary train movement did not establish a violation of the Boiler Inspection Act, but at most presented a question for the jury. Courts and litigants, if the instant opinion is permitted to stand, will be at a loss to know how to construe the Act.

The various Courts of Appeals have differed in their construction of the coupler provisions of the Safety Appliance Act, and in their interpretation of the *Gotschall* case. In the second and sixth circuits it has been held that the use of coupling appliances which fail to hold the cars together is a violation of the Act as a matter of law. See *Keenan* v. *Director General of Railroads,* 285 F. 286 (2nd Cir.), *certiorari* denied 261 U. S. 616; *Erie R. Co.* v. *Caldwell,* 264 F. 947 (6th Cir.), and *Reetz* v. *Chicago and E. R. Co.,* 46 F. 2d 50 (6th Cir.).

The court in the seventh circuit, on the other hand, in *Vigor* v. *Chesapeake and O. Ry. Co.,* 101 F. 2d 865, has given the Act a literal interpretation, holding that recovery under the Act may only be had if the injuries

were proximately caused by failure of the cars to couple automatically or the impossibility of uncoupling them without going between them, and that proof of an undesired uncoupling is only evidence that the cars had not been completely and effectively coupled. It is uncertain whether the same court is adhering to this interpretation in the instant case, (171 F. 2d 973) or is holding broadly that from the breaking of a coupler the jury may infer a violation of the Act. In either event, the court in this circuit takes the view that the question of violation of the Act must be left to the jury, and in effect holds that the plaintiff must prove negligence to establish such violation.

There may be uncertainty as to whether the *Gotschall* case was decided on the question of causal relation—the uncoupling of the cars having established the violation of the Act as a matter of law—or whether the uncoupling was merely evidence from which the jury were permitted to infer a violation. The former view is taken by the court in *Philadelphia & R. Ry. Co.* v. *Eisenhart,* 280 F. 271, 275, (3rd Cir.) and the latter by the Circuit Court in the instant case.

The same conflicts obtain in the State Courts. The Minnesota, Arizona and Missouri courts have held that the failure of couplers to hold the cars together establishes a violation of the Act as a matter of law. See *Kowalski* v. *C. and N. W. Ry. Co.,* 159 Minn. 388, 199 N. W. 178; *So. Pac. Co.* v. *Thomas,* 21 Ariz., 355, 188 Pac. 268 (cert. den. 255 U. S. 576) and *McAllister* v. *St. Louis Merchants' Bridge Term. Ry. Co.,* 324 Mo. 1005, 25 S. W. 2d 791. The question was left to the jury in *Stewart* v. *Wabash R. Co.,* 105 Neb. 812, 182 N. W. 496, and *Saxton* v. *D. and H. Co.,* 256 N. Y. 363. The Illinois Supreme Court, in *Woods* v. *C. B. and Q. R. R. Co.,* 306

Ill. 217, has held that the Act is to be given a narrow, literal interpretation, and that it has no relation whatever to a case in which injury results from the breaking of a coupler.

In view of the importance of the questions raised in the instant case to thousands of railroad employees all over the country, we respectfully submit that the petition herein should be granted and the Court should hold that the Safety Appliance Act imposes an absolute duty upon the carrier to provide safe coupling appliances, and that such duty is violated as a matter of law when couplers fail to hold cars together in an ordinary train movement.

The restrictive interpretation given the Safety Appliance Act by the trial court and by the Court of Appeals in the present case renders it virtually meaningless in respect of all persons other than those employees who may be injured while actually performing coupling or uncoupling operations. If the Congress intended thus to limit the requirements of the Act, its violation could not, we submit, inure to the benefit of all railroad employees or to the traveling public, as this Court has frequently held it does. If a literal compliance with the Act is all that Congress intended to require of the railroads, then they may with impunity furnish defective and insecure couplers provided they perform the preliminary function of coupling automatically. If they should break in two and wreck a train immediately after being coupled, injuring passengers or the public, no recovery could be had for a violation of the Act.

In the instant case the plaintiff has been deprived of all benefit of the Safety Appliance Act. The trial court superimposed on the plain language of the Act, and on the construction placed upon it by this court, the further requirement that the plaintiff prove that the defendant was negligent in its maintenance of the coupler. Since the plaintiff could furnish no such proof, she was unable to recover.

## Prayer.

Wherefore, for the reasons above given, petitioner respectfully prays that a writ of *certiorari* be issued to the Court of Appeals for the Seventh Circuit to the end that this cause may be reviewed and determined by this court; and that the judgment of the Court of Appeals be reversed; and for such other and further relief as to the Court shall seem just.

JOSEPH D. RYAN,
Attorney for Petitioner.

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948.

---

**No.**

---

**SARAH O'DONNELL, Administratrix of the Estate of WILLIAM O'DONNELL, Deceased,**

**Petitioner,**

VS.

**ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,**

**Respondent.**

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## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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### I.

### Opinion Below.

*O'Donnell* v. *Elgin, Joliet & Eastern Ry. Co.*, 171 F. 2d 973.

### II.

### Jurisdictional Grounds.

The jurisdiction of this court is invoked under New Title 28, United States Code, Judiciary and Judicial Procedure, Section 1254.

The Court of Appeals for the Seventh Circuit has rendered a final judgment interpreting the Safety Appliance Act (45 U.S.C.A., Section 2) in a manner probably not in accord with this court's decisions in *Minneapolis and St. Louis R. R.* v. *Gotschall*, 244 U. S. 66; *San Antonio Ry.* v. *Wagner*, 241 U. S. 476; *St. Louis, I. M. & Southern Ry. Co.* v. *Taylor*, 210 U. S. 281; *Chicago, Burlington and Quincy Ry. Co.* v. *United States*, 220 U. S. 559; *Delk* v. *St. Louis & San Francisco R. R. Co.*, 220 U. S. 580, and *Texas & Pacific Ry. Co.* v. *Rigsby*, 241 U. S. 33, and contrary to the decisions of the second circuit in *Keenan* v. *Director General of Railroads*, 285 F. 286, and the sixth circuit in *Erie R. Co.* v. *Caldwell*, 264 F. 947, and *Reetz* v. *Chicago & E. R. Co.*, 46 F. 2d 50.

There is a great divergence of judicial opinion as to the interpretation of the coupler provision of the Safety Appliance Act, and it is of fundamental importance in the administration of that Act that this court exercise its supervisory power to resolve the question and finally determine the full scope and application of the section referred to.

## Statement of the Case.

The fatal accident in this case occurred in the yard of the defendant at Gary, Indiana, during the nighttime of January 9, 1946. Decedent was a switchman, a member of a crew of which his brother, Jack O'Donnell, was conductor (R. 29, 31). Shortly before the accident decedent and his brother were talking together. Decedent told his brother that he had some couplings to make on the west (or near) end of track 5 (R. 37). He then started walking down the lead toward this track (R. 79). The conductor meanwhile caused a cut of cars which was being broken up to be pulled toward the west out on

the lead. When the cars were clear of the switch leading from the storage track to the lead, the movement was stopped, the switch closed, and the cars were then pushed in an easterly direction down the lead, towards track 5 (R. 40). It was the conductor's intention to stop this cut of cars on the lead, west of track 5, uncouple and leave on this track the leading or easterly car, and then go back and put away the remaining cars, after which he would push the single car standing on the lead into track 5, couple up the cars on that track, and pull them out from the east end (R. 40). This would give the decedent time to adjust the couplers and drawbars on the cars on track 5, for which purpose he had to go between the cars (R. 38).

As the cut of cars advanced in an easterly direction on the lead, towards track 5, at a speed of about ten miles an hour (R. 43) the conductor signaled the engineer to stop (R. 40). This signal was not obeyed (R. 41). Another signal was given, which was not obeyed (R. 42). Finally the conductor gave a washout or emergency stop signal (R. 41). The cut of cars was thereupon brought to a stop, but the coupler broke in two back of the two leading cars, permitting them to impact violently against the cars standing on track 5 (R. 42, 43). The force of the collision moved the standing cars a car length or more toward the east (R. 89), and coupled up the cars standing on track 5 (R. 43, 48, 92, 93). The coupler broke at a partial fracture (R. 47, 92); the broken pieces of the coupler fell down between the tracks (R. 47).

The decedent was not missed at first, but some time later a search of the yard disclosed his body, lying close up against the north rail of track 5, badly mutilated (R. 52, 105). Between the rails of track 5, about 60 or 70 feet beyond the lead track, a safety sign was lying (R.

106). This sign was a board about two by one and a half feet, adjustable so that it could be placed upright when in use, and laid down flat when not in use (R. 61). Just at this sign decedent's lantern was lying (R. 52). In the edge of the sign a fresh chip had been knocked off (R. 54, 106). There were footmarks south of the safety sign in the center of the track (R. 54). On both sides of the rail, and proceeding eastward from the sign, there were signs of dragging, or brush marks, extending along inside of the rail for a car length or more (R. 54, 106), up to the point where the body was lying (R. 54, 106, 107, 111).

**Specification of Errors to Be Urged.**

The District Court Erred:

1. In refusing to hold that the use of a car with a coupler that breaks in normal use is a violation of the Safety Appliance Act, and therefore negligence *per se.*

2. In refusing to hold that a carrier is bound absolutely to furnish couplers which will not break under ordinary usage.

3. In instructing the jury literally in the language of the Safety Applicance Act, without informing them of the judicial construction placed upon that Act.

4. In instructing the jury that defendant denied that the Safety Appliance Act was applicable, and in permitting defendant's counsel to argue to the jury, over plaintiff's objection and protest, that the only duty the defendant owed, in respect of its couplers, was the duty to exercise ordinary and reasonable care, and that if the couplers coupled automatically by impact (which the evidence showed without dispute they did) there was no violation of the Act.

5. In permitting the jury to construe the Act to determine whether the use of a defective coupler was a violation of it.

6. In instructing the jury in substance that the plaintiff must prove the defendant guilty of negligence; that it is not sufficient to show that the defendant may possibly have been guilty of negligence, but that the evidence must point to that fact; and that if the evidence is uncertain the jury have no right to guess between various causes and find that the negligence of the defendant was the proximate cause of the accident if there is no satisfactory foundation in the evidence for such conclusion.

7. In instructing that the mere happening of an accident does not in and of itself create a liability; that the happening of the accident carries with it no presumption of negligence, but that is an affirmative fact which the plaintiff must prove.

## Summary of the Argument.

The Safety Appliance Act makes it mandatory on the carrier to provide couplers that will not break in normal use; breaking of a coupler in normal use is a violation of that Act, and negligence *per se*, and the jury should have been so instructed.

The court erroneously left to the jury the decision of a purely legal question, *viz.*, the construction of the Safety Appliance Act.

The court gave misleading instructions, telling the jury the plaintiff must prove the defendant guilty of negligence. These instructions were manifestly inapplicable to plaintiff's claim under the Safety Applicance Act, but the jury were not advised of this distinction, and undoubt-

edly believed that the plaintiff must prove the defendant committed actual negligence in the maintenance of the coupler. The effect of the court's ruling on instructions, and the defendant's argument to the jury, was to deprive the plaintiff of all benefit of the Safety Appliance Act.

## ARGUMENT.

**The Safety Appliance Act makes it mandatory on the carrier to provide couplers that will not break in normal use; breaking of a coupler in normal use is a violation of that Act, and negligence per se, and the jury should have been so instructed.**

The coupler provision of the Safety Appliance Act requires the carrier to furnish couplers which couple automatically by impact, and which can be coupled without the necessity of men going between the ends of the cars.

In *St. Louis, I. M. & S. Ry. Co.* v. *Taylor*, 210 U. S. 281, 295, this court said that:

> "The obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just,"

The qualified duty which the court mentions, as theretofore existing, obviously was the duty to exercise reasonable care in the maintenance of the appliances. This duty was made absolute.

In the case of *C. B. & Q. Ry. Co.* v. *United States*, 220 U. S. 559, this court adhered to the doctrine announced in the *Taylor* case, and stated that the question was not open to further discussion (p. 577). Notwithstanding this pronouncement, an attempt was made in *San Antonio Ry.* v. *Wagner*, 241 U. S. 476, to induce the court to qualify the construction theretofore placed upon the Act. This the court refused to do, saying that:

> "• • • it clearly is the legislative intent to treat a violation of the Safety Appliance Act as 'negligence'—what is sometimes called negligence *per se*." (p. 484).

In *Minneapolis & St. L. R. Co.* v. *Gotschall*, 244 U. S. 66, 67, in which an unintended separation of couplers gave rise to an accident, the court stressed "the positive duty imposed by the statute [Safety Appliance Act] upon the railroad to furnish *safe* appliances for the coupling of cars." (Our italics.)

From these decisions, it is clear that this court has construed the Safety Appliance Act as embracing these two propositions:

a. Not only must the couplers couple automatically, but they must be *safe* and operate efficiently.

b. A failure to meet either of the above requirements is negligence *per se*.

It is our contention that the breaking of the couplers in this case was a violation of the Safety Appliance Act and therefore negligence *per se*, and that the trial court should have so instructed the jury. In failing so to instruct, the trial court deprived plaintiff of all benefit of the Act, as we will show hereafter.

In the following cases, a breaking or unintended separation of couplers was held or conceded to prove a violation of the Act as a matter of law; *Keenan* v. *Dir. Gen.*, 285 F. 286 (2d Cir.); *Erie R. Co.* v. *Caldwell*, 264 F. 947 (6th Cir.); *Reetz* v. *Chicago and E. R. Co.*, 46 F. 2d 50 (6th Cir.); *Kowalski* v. *C. & N. W. Ry. Co.*, 159 Minn. 388, 199 N. W. 178; *So Pac. Co.* v. *Thomas*, 21 Ariz. 355, 188 P. 268 (cert. den. 255 U. S. 576) and *McAllister* v. *St. Louis Merchants' Bridge Term. Ry. Co.*, 324 Mo. 1005, 25 S. W. 2d 791.

It is true that, in many cases, whether there has been a violation of the Act may be a question of fact, and therefore require submission to the jury. Such cases as those where a coupling appliance is claimed to have failed,

when it worked perfectly before and after the accident, are illustrations. But no such question arose here. This coupler broke squarely in two, along the line of a partial fracture, on an ordinary switching movement, when the train was stopped suddenly while moving only ten miles an hour, and the broken parts fell down between the rails and lay there. In this situation, what possible factual question as to the Act was there for the jury to decide, other than the question of causal relation? No one could reasonably contend that this was a safe coupler. Sudden stops at low speeds during switching movements are a common occurrence, and the strain thereby imposed upon couplers is one they are designed to withstand, with a considerable margin of safety. There can be no doubt that in the instant case the strain was well within normal limits, since the coupler was subjected only to the force imparted by the momentum of two cars and since no other coupler broke. The breaking of the coupler clearly established a violation of the Act.

Neither the defendant, nor the trial or Circuit Court, has suggested any possible reason that could be advanced to support a finding that the coupler in question was not defective, and we submit that none could be suggested.

The positive duty to provide couplers that will not break during ordinary use is implicit in the Act. If the duty were limited to the specific requirements of the Act it would rarely inure to the benefit of employees other than those engaged in coupling or uncoupling operations, or to the benefit of the traveling public. It was the intention of Congress, in enacting the Safety Appliance Act, to give broad protection to railroad employees and to the public against the consequences of the use of defective

equipment, and this purpose would be defeated by a narrow interpretation of the coupler provisions. Under such an interpretation, no matter how defective couplers might be, their use would not be in violation of the Act so long as they coupled automatically, and although they might break and wreck a train, an injured employee or passenger would be denied the protection of the Act.

This Court has rejected any such narrow interpretation of the Act in the *Gotschall* case, as well as in the more recent cases of *Fairport R. Co.* v. *Meredith*, 292 U. S. 589, and *Coray* v. *Southern Pacific Co.*, 335 U. S. 520. Its recognition of the positive duty to furnish safe coupling appliances is clear and unequivocal and calls for an instruction as a matter of law in every case in which there can be no rational contention that the appliance was safe. While the question was left to the jury in the *Gotschall* case, that case involved a separation of new couplers, and men might reasonably disagree as to their condition, but in the instant case, where the coupler broke in two, there is no room for such disagreement.

The Court of Appeals, in its opinion, declared that the true rule to be applied was that the jury might, "if they think it reasonable under all the circumstances, infer that the coupler was defective and was furnished and used in violation of the Act." This seems to us an unsound statement. If the jury are given the privilege of inferring that a coupler which breaks in two under ordinary usage does not comply with the Act, then conversely, under the same circumstances, they may also infer that the same coupler complies with the Act. This conclusion would fly in the face of the Act, the decisions construing it, and the humanitarian purposes it was designed to accomplish.

The District Court instructed the jury in the language of the Act itself (R. 186), telling them that the couplers

furnished must couple automatically by impact, without the necessity of men going between the ends of the cars. As given, the charge was utterly foreign to any of the issues of the case. Nobody claimed that the coupler which broke did not couple automatically prior to the accident; the act of coupling had nothing to do with our case. What conclusion could the jury possibly draw from this portion of the charge? It seems inescapable that they decided that the Act had not been violated. Certainly they would never suspect from anything the court told them that a coupler which broke might be furnished in violation of the Act.

This was exactly the argument which counsel for the defendant made to the jury, over our objection, but with the court's approval. Counsel argued as follows (R. 158):

> "The law does not say anything whatever about couplers which break, and I think after you hear Judge Campbell's instructions as to what the law is you will conclude that the requirements of the law, so far as a coupler breaking is concerned, is that the railroad company must use ordinary and reasonable care. There is not a word of evidence here that there was anything about the condition of this coupler which could have caused anyone to believe that it was at all likely that it would break. So I say if that is the law you must necessarily find that there has been no proof here that the railroad company was negligent as concerns that coupler."

And this in the face of the pronouncements of this court that the duty is absolute to provide safe coupling appliances, and a violation of this duty is negligence *per se*!

We objected to this line of argument, but our objection was overruled (R. 159).

In *Brady* v. *Terminal R. R. Assn.*, 303 U. S. 10, 15, the court said that the duty imposed is not based on

negligence, but is absolute, and "the carrier is not excused by any showing of care however assiduous."

So we see that the court not only failed to instruct the jury that the breaking of the coupler was a violation of the Safety Appliance Act and negligence *per se*, but approved an argument which told the jury that the Act did not apply at all, and that the defendant need only exercise ordinary care.

The ruling of the court on the instructions and the argument deprived the plaintiff of all benefit she might hope to derive from the Safety Appliance Act, and stripped it of its meaning so far as this case was concerned. If the Act had never been passed, the jury might still have inferred negligence from the breaking of the coupler. The common law raised a "qualified duty" of ordinary care in this situation; and under the principle of *res ipsa loquitur* the breaking of the coupler in itself might be sufficient to take the plaintiff's case to the jury. *Jesionowski* v. *Boston & M. R. Co.*, 329 U. S. 452; *Johnson* v. *United States*, 333 U. S. 46. The situation would have been no different had the court dismissed the Safety Appliance Act count at the conclusion of plaintiff's evidence.

**The court erroneously left to the jury the decision of a purely legal question, viz., the construction of the Safety Appliance Act.**

The breaking of the coupler was not in dispute. There was no factual question (except causal relation) for a jury to decide. The facts being admitted, their effect was a question of law. When the court instructed the jury in the language of the Act, and left it to them to construe the Act, he was asking the jury to decide a question of

law. How were the jury to know that this court had construed the Act to require the carrier to furnish safe and efficient couplers?

In one portion of his charge the Court told the jury that if they believed "that the defendant, at the time and place in question, used and operated a car with a defective coupler, contrary to the provisions of the Federal Safety Appliance Act, and that said coupler broke, and that as a direct and proximate result thereof, the plaintiff's decedent sustained injuries which resulted in his death, then you *may* find the defendant guilty." (Italics ours.) (R. 188). The jury is here required to find four things: (1) that defendant used a defective coupler; (2) that such use was contrary to the Act; (3) that the coupler broke; and (4) proximate cause. The jury is not only required to find that the coupler was defective—as to which there could be no rational dispute—but that its use was contrary to the statute. They are told that if they so find, and also decide the other two prerequisites in favor of plaintiff, they may, but are not required to, find the defendant guilty. The jury are given the improper task of construing the Act—deciding a question of law—but in view of the Court's having read to them the literal language of the Act and told them the statute required the defendant to furnish that kind of couplers, (R. 186) without also telling them that the Act also required defendant to furnish safe coupling appliances—it is perfectly clear that the jury would construe the Act literally.

**The court gave misleading instructions, telling the jury the plaintiff must prove the defendant guilty of negligence. These instructions were manifestly inapplicable to plaintiff's claim under the Safety Appliance Act, but the jury were not advised of this distinction, and undoubtedly believed that the plaintiff must prove the defendant committed actual negligence in the maintenance of the coupler.**

In addition to requiring the jury to decide whether the coupler was defective, and to construe the statute, they were told that the plaintiff had to prove negligence. This requisite was not confined, as it should have been, to the first charge of negligence, but applied as well to the charges of violations of the Safety Appliance Act. No one can read the Court's charge as a whole without reaching the conclusion that any jury being so instructed would understand that plaintiff had to prove a want of ordinary care in the maintenance of the coupler. After telling them what the allegations of the complaint and answer were, the Court said (R. 185):

> "Now, you will recall from reading of the pleadings that there are three acts of negligence charged by the plaintiff. The first, may we say, is more or less a general violation of the Federal Employers' Liability Act. The third gives the specific violations of the Federal Safety Act with reference to couplers. Those are the three acts of negligence that the plaintiff charges, and the defendant denies them, and also sets up contributory negligence."

A little later (R. 187) he said:

> "The mere happening of an accident by which the plaintiff's intestate or plaintiff's decedent lost his life does not in and of itself create a liability upon the defendant to pay for it. They have to meet their burden of proof which I will attempt to define to you a little further on. You must first establish

that the defendant is liable. So that when you go to the jury room for the consideration of this case you must first determine whether or not the defendant is guilty of one or more or all of these acts of negligence to which I have just referred. • • •

"Now, she must further prove that such negligence of the defendant was the proximate cause of the death of the decedent in this case. • • •"

"Now, I have used some terms here that I think I ought to explain to you. First of all, negligence: Negligence is perhaps most easily defined as the doing of something which an ordinarily reasonably, prudent man or woman would not have done under similar or like circumstances, or the failure to do something which an ordinarily reasonably prudent man or woman under like or similar circumstances would have done" (A. 188).

Then comes the portion of the charge above referred to requiring the jury to construe the Act, which is immediately followed, at R. 189, by this:

"Now, as I have told you in the beginning, the fact of an accident carries with it no presumption of negligence on the part of the defendant. That is an affirmative fact for the plaintiff to prove. Plaintiff must prove that the defendant has been guilty of negligence as alleged in the plaintiff's complaint, one of these three things that I have been enumerating to you. It is not sufficient for the plaintiff to show that the defendant may possibly have been guilty of negligence. The evidence must point to the fact that it was guilty of such negligence, and if you believe from all of the testimony that the matter is uncertain and it shows that William O'Donnell may have been killed in the course of the final movement of cars out of Track 5 rather than the movement in the course of which the coupler broke, you have no right to guess between these various causes and find that the negligence of the defendant

was the proximate cause of the accident if there is no satisfactory foundation in the testimony for that conclusion.

"The burden of proof is not upon the defendant to show that it is not guilty of any of the specific acts of negligence charged, but the burden is upon the plaintiff to show by a greater weight or preponderance of the evidence that the defendant is guilty as charged in the complaint."

There can be no doubt that the court's reiteration and emphasis of its charge that the burden is upon plaintiff to prove negligence, and the defendant's argument, over our objection and with the Court's approval, that so far as a coupler breaking is concerned, the railroad must use ordinary and reasonable care and that since there was nothing about the coupler that would lead anyone to believe it was likely to break there was no proof that the railroad was negligent in respect to that coupler, necessarily led the jury to believe that plaintiff had to prove a failure to exercise ordinary care in its maintenance.

This portion of the Court's charge is also erroneous in confusing causal relation with negligence, and in admonishing the jury that they cannot guess between various causes and find the defendant's negligence the proximate cause of the accident if there is "no satisfactory foundation in the testimony for that conclusion". The court in effect denied them the right to draw legitimate inferences from the evidence and invited them to find that there was no satisfactory foundation for a verdict for the plaintiff.

The instructions here criticized are much more confusing and erroneous than those which caused a reversal in *Zumwalt* v. *Gardner*, 160 F. 2d 298, where the court, while conceding that a Safety Appliance Act instruction

was correct in part (which cannot be conceded here), held that interspersed references to negligence rendered the instruction as a whole misleading, and necessitated a new trial.

These instructions, well calculated to mislead the jury, are of the type condemned in *Cummings* v. *Pennsylvania* R. Co., 45 F. 2d 152, 153, wherein the jury is "left to take its choice between two inconsistent statements of the law, one of which was wrong and one right." This court reversed the case of *Deserant* v. *Cerillos Coal R. Co.*, 178 U. S. 409, 420, which was based on the Miners' Safety Act, because the trial court in instructing the jury, ignored the obligations imposed by the statute, made the duty of the mine owner relative, not absolute, and its test what a reasonable person would do, instead of the command of the statute. That is precisely what occurred here. This court has held, in *Fillippon* v. *Albion Vein Slate Co.*, 250 U. S. 76, 82, and in *McCandless* v. *United States*, 298 U. S. 342, 347, 348, that erroneous rulings are presumptively injurious, and are ground for reversal unless it affirmatively appears that they were harmless.

It will undoubtedly be urged that we failed to object specifically to the instructions which we now criticize. This is not true; we told the court, first, that we did not believe he had made it plain that a violation of the Safety Appliance Act was in and of itself negligence (R. 193). To this the court replied that he thought he had done very well (R. 193). We then amplified our objection, and went on to object to that part of the charge which was concerned with the "mere accident" theory (R. 194). Our whole argument was based on the repeated decisions of this court that a violation of the Safety Appliance Act is negligence *per se;* and our objection neces-

sarily applied to any part of the charge inconsistent with this rule. Furthermore, we submitted this in our proposed instructions Nos. 5, 6, 7 and 8 (R. 261, 262) which the court declined to give.

In the requests noted, we asked the court to instruct that the breaking of the coupler established a violation of the Act as a matter of law; we also asked the court, in request No. 4 (R. 261) to tell the jury it was defendant's absolute duty to provide couplers that would remain coupled. The subject was thoroughly covered.

We objected specifically to the defendant's argument that the br aking of a coupler was not a violation of the Safety Appliance Act, but our objection was brushed aside (R. 159).

Indeed, the court peremptorily refused to permit us to discuss the instructions prior to the time they were given, so that we would know how to argue our case, saying (R. 144):

"We will not discuss the instructions. I will instruct the jury."

In his argument to the jury counsel for the defendant stated (R. 156):

> "The law says that Mrs. O'Donnell must prove that her husband was killed by the fault or negligence of the railroad company, and the law says that unless she proves that to your satisfaction she can receive nothing."

Counsel for defendant (R. 158) repeated the specific language of the statute which required the railroads to furnish couplers that could be coupled and uncoupled automatically by impact without the necessity of men going between the ends of the cars; then asserted that "Judge Campbell's instructions • • • so far as a coup-

ler breaking is concerned, is that the railroad company must use ordinary and reasonable care"; that there was no proof "which could have caused anyone to believe that it was at all likely that it would break" or that the defendant "was negligent as concerns that coupler"; that (R. 158, 159) the car in question "did couple automatically by impact when the engine tied on to the cars on track 2" * * *. Our objection to this argument (R. 159) was overruled, the Court remarking: "You will have a chance to protest when you answer him. Go ahead with your argument." Immediately following the above ruling, counsel for defendant further stated (R. 159):

> "So far as that car is concerned, ladies and gentlemen, when you listen to Judge Campbell's instructions, listen and see if he doesn't tell you that this is the test of a violation of the coupler provision of the Safety Appliance Act and if that is what he tells you is the test, then necessarily you must find that this car met that test because in neither one of those respects is there a word of evidence here as to any failure of that car to function in the two respects that the statute requires."

The Court instructed precisely as counsel predicted quoting the statute literally, then admonished the jury (Tr. 186):

> "That is the statute. Now, that statute places upon the railroad engaged in the type of business that this railroad was engaged in at the time of this occurrence an absolute duty to provide the couplers which I have just read to you from the statute, and to provide them in such order as the statute indicates."

The defendant denied specifically that the Safety Appliance Act applied to the movement which resulted in decedent's death, and also specifically denied that the coupler failed to comply with the provisions of the Act

(R. 14). This defense was read to the jury by the court (R. 185). Since the evidence was undisputed, these defenses were nothing more than conclusions of law. Obviously, if the Act was not applicable, or did not require the defendant to do more than furnish cars which would couple automatically by impact, the charge contained in Paragraph (c) of plaintiff's complaint, (R. 13) (alleging that the defendant violated the Act by furnishing a car with a coupler so "defective and insecure that it broke loose" from the car to which it was attached) failed to state a cause of action, and its legal sufficiency could and should have been tested by motion to strike. This the defendant failed to do and the question whether the Act was violated was treated as one of fact for the determination of the jury. We submit that the defendant, in the circumstances, is estopped from questioning the sufficiency of the allegations, as above set forth. The action of the trial court in giving the jury *carte blanche* to construe the statute and pass upon the legal question involved is without precedent.

Moreover, it is quite obvious that if the statute were inapplicable to the movement involved and the breaking of the coupler, under the undisputed evidence in this case, did not prove a violation of the Act or come within its purview, then the jury should not and could not be permitted to infer that the breaking of the coupler violated the Act.

In the absence of an instruction directing the jury relative to the positive duty imposed on the defendant to furnish safe and efficient couplers and the legislative intent to treat a violation of the Act as negligence *per se*, the jury had no alternative (under the court's instructions that the Act required the defendant only to furnish

couplers that could be coupled and uncoupled automatically by impact) but to find that the Act had not been violated.

The respondent will undoubtedly rely on *New Orleans R. R. Co.* v. *Scarlet*, 249 U. S. 528, as did the Court of Appeals. That case, which arose under the Boiler Inspection Act, has never been followed or cited by this court. It is inconsistent with the interpretation of the Safety Appliance Act as announced by this court in numerous cases, and we submit that, in the light of the more recent cases, and the current trend in judicial decisions, the case should be re-examined.

This court's decision in the *Scarlet* case could well be sustained on the ground that the lower court in that case held the Mississippi "Prima Facie Act" applicable; whereas of course, this court has consistently held that no state act may be availed of as a substantive ground of recovery where the Safety Appliance Act is involved. The language of the court about the breaking of the king-pin not establishing as a matter of law that it was defective, was not necessary to the decision.

## Conclusion.

Petitioner therefore urges that the writ prayed for in the petition be issued; that the decision of the Court of Appeals for the Seventh Circuit be reviewed by this court, its judgment reversed and this cause be remanded with directions for a new trial.

JOSEPH D. RYAN,
Attorney for Petitioner.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1949

No. 56

SARAH O'DONNELL, Administratrix of the Estate of WILLIAM O'DONNELL, Deceased,
Petitioner,

vs.

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,
Respondent.

## Petitioner's Reply Brief

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948.

## No. 743

**SARAH O'DONNELL, Administratrix of the Estate of WILLIAM O'DONNELL, Deceased,**

Petitioner,

vs.

**ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,**

Respondent.

## PETITIONER'S REPLY BRIEF.

Defendant's contention that this case was tried on the issue of whether decedent was killed when the coupler broke or whether his death occurred on a later movement is only a half truth. While this issue was raised, it was only camouflage. Defendant's real defense was that it was not negligent in the use or maintenance of the coupling which broke.

Counsel told the jury that:

> "• • • the railroad company must use ordinary and reasonable care. There is not a word of evidence here that there was anything about the con-

dition of this coupler which could have caused anyone to believe that it was at all liable to break. So I say if that is the law you must necessarily find that there has been no proof here that the railroad company was negligent as concerns that coupler" (R. 158).

Again:

"There is not a word of evidence here, is there, that that car failed in any way to couple automatically by impact upon that movement or upon any other movement which this crew or any other crew made with that car" (R. 159).

Further:

"There is not a word of evidence in this record of any attempt to uncouple the E. J. & E. car upon which the coupler broke, and that it could not uncouple without the necessity of a man going between the ends of the cars.

"So far as that car is concerned, ladies and gentlemen, when you listen to Judge Campbell's instructions, listen and see if he doesn't tell you that this is the test of a violation of the coupler provision of the Safety Appliance Act, and if that is what he tells you is the test, then necessarily you must find that this car met that test because in neither one of those respects is there a word of evidence here as to any failure of that car to function in the two respects that the statute requires" (R. 159).

The foregoing are all quotations from counsel's final argument to the jury. While it is true that counsel also argued about which movement caused decedent's death, it is incontrovertible that the safety appliance issue was submitted to the jury, and submitted under a fundamental misconception of the law, the jury being told by counsel, with the court's approval, that before a recovery could be had on the safety appliance violation, negligence must be shown. Since we could prove no specific act of negligence, the jury necessarily found against us.

In the margin we have answered defendant's factual contentions, under the headings 1, 2, 3 and 4.

In *St. Louis & S. F. R. Co.* v. *Delk*, 158 F. 931, the defendant took the same position in respect to the Safety Appliance Act which is taken by the instant defendant. The Circuit Court of Appeals there held that the railroad discharged its statutory duty if it exercised reasonable diligence to keep the coupling in repair. This court, however, reversed the intermediate court, in *Delk* v. *St. Louis & S. F. R. Co.*, 220 U. S. 580, holding that an absolute duty rested on the carrier "to provide and keep proper couplers at all times and under all circumstances." In view of this holding, the language of counsel which we have just quoted, and the action of the trial court in overruling our objection to it and thus approving it, cannot be justified.

Our motions for a directed verdict for the plaintiff, made at the conclusion of all the evidence and for a new trial following the verdict, were overruled (R. 222).

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1. Defendant's brief, p. 10, in attempting to prove that decedent was not killed on the movement when the coupler broke, asserts that it must be presumed that decedent, an experienced railroad man, "knowing the next movment was to be made onto this track would not put himself in a position of danger between the cars." This assertion is not only based on a false premise but is conceded to be false by defendant's counsel. He quotes from his argumnt, brief, p. 8, to prove that he accepted the foreman's testimony that it was not his intention to put any cars on track 5 on the movement when the coupler broke. In his argument to the jury, in commenting on the foreman's testimony on this subject, that no movement was to be made on that track at that time, he stated: "I will take his word for it." It thus appears that one of the chief reasons assigned by defendant in support of its contention that it was more likely that decedent came to his death on the final movement of the train out of the yard, rather than on the movement when the coupler broke, finds no support in the evidence. Decedent had no reason to apprehend danger from the movement being made at the time the coupler broke.

As pointed out and urged in our petition, the undisputed physical facts and circumstances in evidence proved conclusively that decedent came to his death as the result of the breaking apart of a defective coupler, as charged in the plaintiff's complaint. Defendant's contention that decedent met his death at a later time and on a later movement when the train was being pulled out of the yard is not supported by any probative evidence or by any legitimate inference. In order to reach any such conclusion it would be necessary to resort solely to speculation and conjecture.

In the case of *Brady, Administratrix* v. *Southern Ry. Co.*, 320 U. S. 476 (cited by defendant under Point II) which was an action under the Federal Employers' Liability Act for the alleged wrongful death of a brakeman, there was a judgment for the plaintiff which was reversed by the Supreme Court of North Carolina. That court held there was no evidence to support the verdict and that, therefore, the case was improperly sub-

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2. Defendant's second contention is that the fact that all the open couplers "coupled up following the impact indicated that at the time of the impact the deceased had reached a point about 200 feet east of the place at which plaintiff contends he was standing." This latter statement is just pure fiction. Decedent was last seen alive walking in a direction south of east towards track 5 (R. 79) from the north side of track 1, immediately after he had stated to the foreman that he had some couplings to make on the west end of that track (R. 37). Some of the cars which had been shunted in onto track 5 previously had failed to couple automatically. There were two openings between the cars. The first opening of about a car length (45 feet) commenced at the east end of the third car (numbering from west to east) at a point 65 or 70 feet east of the switch leading from the rip track onto track 5, just at a safety sign previously referred to at the place where the brush marks commenced (R. 58). Next to this opening there was a single car (the fourth car from the west) which had failed to couple and then a small gap between that car and the next one to the east standing on that track (R. 37). The second opening (the smaller gap) therefore, was just two car lengths, 90 feet (not 200 feet) east of the spot where decedent was struck.

mitted to the jury. This court, in affirming the Carolina court stated, pp. 479, 480:

> "• • • The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the triers of the fact—in this case, the jury. *Western & Atlantic R. Co.* v. *Hughes, supra; Baltimore & Ohio R. Co.* v. *Groeger*, 266 U.S. 521, 524. *Cf. Gunning* v. *Cooley*, 281 U.S. 90, 94; *Commissioners* v. *Clark*, 94 U.S. 278, 284. When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict."

Had the plaintiff been required, as an essential element of her case, to prove that the death of her husband occurred on this latter movement, the trial court would have been required to direct a verdict for the defendant on the ground there was no evidence to support the charge.

Viewed from any standpoint, the only question which could properly have been submitted to the jury was that of causal relation or proximate cause. As hereto-

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3. It is also urged by defendant that if the decedent was adjusting the coupler at the westerly opening at the time the coupler broke since the impact moved the cars about a car length (45 feet) his body would have been right at the opening between the cars where Jack O'Donnell could not have failed to see it as he passed along the side of the train inspecting the couplers. Defendant ignores the undisputed evidence that when the impact occurred both openings between the cars were closed and the cars were all coupled together. This in itself proves that the front of the third car which ran over and killed the decedent passed some distance beyond his body and that his body was lying underneath the side of the car several feet (the length of the second opening) west of the couplers between the third and fourth cars.

fore shown, the jury, under the court's instructions, were not required to consider or pass on that question.

## II.

Some stress is laid on the fact that the stop which caused the coupler to break was violent, the implication being, apparently, that this coupler would have withstood normal usage, and that the accident may be laid to the conduct of the engineer rather than to the condition of the coupler. It is a matter of common knowledge that cars, in switching movements, are continually subjected to violent impacts, starts and stops. Normal use must be held to include the banging around which a car will get in switching. It surely cannot be maintained that a sudden or emergency stop of a train while traveling at a speed of eight or ten miles an hour is anything out of the ordinary in railroad operations. The car in question, with a partially fractured coupler, obviously did not meet any standards of safety whatever, whether normal or otherwise.

We cited a number of cases, in which it was either held or conceded that a defective coupler was a viola-

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4. The contention that decedent was 200 feet east of the westerly opening is further disproved by the undisputed physical facts. There were foot marks south of the safety sign in the center of the track. Proceeding eastward from this sign, there were brush marks and signs of dragging which extended a little over a car length (45 feet) to where decedent's body was found lying north of the north rail of the track and close up against it. There was a fresh chip knocked out of the safety sign (R. 54, 106, 107, 111). Decedent's lantern was found between the rails at this point (R. 52). If decedent fell or missed his footing while attempting to board one of these cars, the sides of which extended two and one-half to three feet over the rails, he could not possibly have fallen between the rails and made the marks indicated. Nor could he have fallen underneath the couplers in the center of the track and made the foot and brush marks found between the rails, had he been climbing over the drawbars and coupling appliances, while attempting to cross between the cars.

tion of the Act as a matter of law. Respondent attempts to distinguish these cases, for one reason or another. We will comment on them briefly.

In *Reetz* v. *Chicago & E. R. Co.*, 46 F. 2d 50, it was conceded that the parting of the train owing to the breaking of the couplers was a violation of the Act.

In *Erie R. Co.* v. *Caldwell*, 264 F. 947, where a train became separated because of a defect in a drawbar, the Circuit Court of Appeals approved an instruction that "the failure to comply with the federal Safety Appliance Act was a direct and proximate cause of plaintiff's injuries." The court, in the instruction quoted, held, as a matter of law, that the defect which caused the train to part was a violation of the Act.

In the case of *Keenan* v. *Director General*, 285 F. 286, in which a coupler dropped to the ground, the court said: "it was demonstrated * * * that there was a violation of the statute" (p. 290). In none of the foregoing cases did the court submit to the jury, as a question of fact, whether there was a violation of the Safety Appliance Act.

In *Kowalski* v. *Chicago & N. W. Ry. Co.*, 159 Minn. 388, the court said: "when they [the couplers] are so defective that the car to which they are attached cannot be held to another by means of the coupler, there is a violation of the Act" (p. 393). The jury were instructed in that case that the railroad was negligent if the coupling apparatus was broken or defective; the court held that the defendant was not prejudiced by the submission to the jury of a question which, *as a matter of law*, must be resolved in plaintiff's favor.

In the case of *Southern Pacific Co.* v. *Thomas*, 21 Ariz. 355, there was a question of fact as to how the train became separated, whether through the intentional opening of the couplers or because of some unnoticed

defect in them. The court held that the evidence sustained a finding that the couplers were defective; that such defect was a violation of the Act, and therefore negligence *per se*. In our case, of course, there is no question that the couplers were defective; the conclusion should be the same.

In *McAllister* v. *Terminal Railway Co.*, 324 Mo. 1005, it was a controverted question of fact whether the coupler was defective and broke. There was no such issue in our case, the undisputed evidence showing the defect and the break. The court in the *McAllister* case said, p. 1014: "If the coupler was defective and broke, permitting the two cars to become disengaged from the train, then defendant * * * violated the Safety Appliance Act and such violation was negligence *per se*."

In the case of *Philadelphia & R. Ry. Co.* v. *Eisenhart*, 280 F. 271, the court held that the mere opening of the couplers justified an inference that they were defective, and that such defect violated the act. In our case the defect was proved; there was no necessity or room for inference.

The rule to be deduced from the foregoing cases is that where it is uncertain whether there is a defect in a coupler, or whether it operated properly, the question is for the jury, who may infer that there was a defect. But where the defect is open, gross and palpable, as in the instant case, there is no occasion for drawing any inference; the violation is proved as a matter of law.

In *Lehigh Valley R. Co.* v. *Beltz*, 10 F. 2nd 74, which was a case under the Boiler Inspection Act, as was the *Scarlet* case, a locomotive boiler blew up, killing the engineer. The rule that the explosion of the boiler constituted evidence from which the jury might infer a violation of the Act was not followed in that case, despite

the language of the *Scarlet* case; on the contrary, the court peremptorily instructed for the plaintiff, leaving to the jury only the question of damages. This, of course, amounted to a holding that the explosion of the boiler was a violation of the Act as a matter of law. This court denied certiorari in the *Beltz* case (270 U.S. 641).

In the case of *Brady* v. *Terminal R. R. Assn.* 303 U.S. 10-16, (Opin. by the late Justice Hughes) it is said, p. 15:

> "The final question must be determined in the light of the nature of the obligation resting upon the carrier in relation to the use of a defective car. The statutory liability is not based on the carrier's negligence. The duty imposed is an absolute one and the carrier is not excused by any showing of care, however assiduous. *St. Louis I. M. & S. Ry. Co.* v. *Taylor,* 210 U.S. 281, 295; *Chicago B. & O. Ry. Co.* v. *United States,* 220 U.S. 559, 570; *Louisville & Nashville R. Co.* v. *Layton,* 243 U.S. 617, 620, 621; *Great Northern Ry. Co.* v. *Otis, Supra,* (239 U.S. 349). The breadth of the statutory requirements is shown by the fact that it embraces all locomotives, cars and similar vehicles used on any railroad that is a highway of interstate commerce and is not confined exclusively to vehicles engaged in such commerce. *Southern Ry. Co.* v. *United States,* 222 U.S. 20. • • • The statute has been literally construed 'so as to give a right of recovery for every injury the proximate cause of which was a failure to comply with a requirement of the act.' *Swinson* v. *Chicago St. P. M. & O. Ry. Co.,* 294 U.S. 529, 531; *Davis* v. *Wolfe,* 263 U.S. 239, 243."

In the latter case it is held that "if the failure to comply with the requirements of the act is a proximate cause of the accident • • • although [plaintiff is] not engaged in an operation in which the safety appliances are specifically designed to furnish him protection" the railroad is, nevertheless, liable.

The principles announced in the foregoing opinion were reaffirmed in the case of *Myers* v. *Reading*, 331 U.S. 477, wherein this court also held that a violation of the Safety Appliance Acts (an alleged inefficiency of hand brake equipment in that case) may be shown by two methods, i. e., (1) by showing some particular defect, or (2) a failure to function when operated with due care. The test to be applied is the performance of the appliance, citing with approval *Philadelphia and R. R. Co.* v. *Auchenbach*, 3 Cir., 16 F. 2d 550. In the latter case it is said, p. 552:

> "The defendant's negligence, if any, consisted in violating a duty imposed by statute. The statute made it obligatory upon the defendant to equip its cars with safety appliances of a kind defined by their operation, namely, couplers that will couple automatically by impact. That duty is absolute and unqualified and contemplates the maintenance of such appliance in working condition 'at all times.' *P. & R. R. Co.* v. *Eisenhart* (C.C.A.) 280 F. 271, 276, and cases cited. The test of the observance of this duty is the performance of the appliances. 'The failure of a coupler to work at any time sustains a charge that the Act has been violated.'" (Citing cases.)

In the case of *Great Northern Ry. Co.* v. *Otis*, 239 U.S. 349, the trial court instructed the jury that if the injuries "were due directly to the absence and imperfect working condition of the coupler in question the defendant would be liable." There was a verdict and judgment entered in favor of the plaintiff, which was affirmed by the Supreme Court of Minnesota (128 Minn. 283, 150 N. W. 922). This court granted a certiorari and in affirming the judgment stated at p. 352:

> "Whether or not the absolute liability created by the earlier act extended to the present case, and we are far from implying that it did not, the Act of 1910 imports with unmistakable iteration, that the liability exists. Under the instructions of the court

> the jury must have found that the defect was the proximate cause of the injury, as that was made a condition of the plaintiff's right to recover. If so, the fact that the plaintiff's conduct contributed to the result was not a defense."

Our proffered instructions (R. 261, 262) predicated upon identical grounds were all refused.

Defendant speaks very learnedly of the rule which is said to have existed for more than 30 years that the jury may infer a Safety Appliance Act violation from the breaking of a coupler. This is a radical departure from its position on the trial. It pleaded that the Safety Appliance Act was not applicable at all (R. 14), argued this point on motion for directed verdict (R. 140), and in its objections to the charge of the court stated that "as a matter of law the breaking of a coupler does not prove nor permit an inference to a violation of the coupling provisions of the Federal Safety Appliance Act" (R. 195). It is only on appeal that defendant has made the concession that the Safety Appliance Act is even remotely applicable to our factual situation.

The defendant's assertion under point II that the fact that a coupler breaks "is evidence from which a jury may infer, but is not compelled to find negligence or a violation of the Safety Appliance Act" is contrary to the theory upon which it tried its case. On the trial defendant took the position and asserted that the breaking of the coupler did not constitute a violation of the statute as pleaded or come within its scope or purview.

In our petition for certiorari we inadvertently stated that defendant failed to test the sufficiency of our charge of a violation of the Safety Appliance Act by proper motion. We find that we were in error in so stating. The motion to test the sufficiency of the paragraph in

question is out of place and appears on the page preceding said paragraph.

The defendant, in its amended answer, under the heading Eighth Defense, (R. 14) stated:

> "Defendant denies that the Federal Safety Appliance Act applies to the movement, referred to in subparagraph (c) of paragraph 6 of plaintiff's complaint, as amended, and specifically denies that the coupler referred to in said paragraph failed to comply with the provisions of the Federal Safety Appliance Act."

Before the case was submitted to the jury, counsel for the defendant (R. 140) moved to strike subparagraph (c) of paragraph 6 of plaintiff's amended complaint. He stated:

> "Then the amendment of subparagraph (c) is that the defendant 'carelessly and negligently failed to equip and maintain on one of the cars being moved along said track a safe and efficient coupler which would remain coupled to the car to which it was attached, but which, on the contrary, was so defective and insecure that it broke loose from said car, contrary to the provisions of the Federal Safety Appliance Act.'
>
> "The Safety Appliance Act, insofar as couplers are concerned, does not require that you have couplers that will not break or will not separate. The language of the Safety Appliance Act is that the cars must be equipped with couplers that would couple automatically on impact or which can be coupled without the necessity of men going between the ends of the cars. In other words, the Safety Appliance Act does not say that you must have safe and efficient couplers on them, nor does it say that the coupler which is ineffective or defective is a violation of the Safety Appliance Act. A coupler violates the Safety Appliance Act only if it fails to couple automatically by impact, without men going between the ends of

the cars. But a coupler on which the drawbar breaks in half is not within the purview of the Safety Appliance Act."

Counsel for defendant, in his objections to the court's charge also stated, among other things (R. 195):

> "Next, the defendant objects to the charge of the court insofar as it submits to the jury as the basis for liability, the charges contained in subparagraph (c) of paragraph 6 of plaintiff's complaint, as amended, for the reason that as a matter of law the breaking of a coupler does not prove nor permit an inference to a violation of the coupling provisions of the Federal Safety Appliance Act, as referred to in that subparagraph, as amended."

Defendant quotes from Roberts Federal Liabilities of Carriers (2nd Ed. 1929) Sec. 620, p. 1211, to the effect that "the true rule is that where a coupler does break the jury may, if they think it reasonable under all the circumstances, infer that the coupler was defective and was furnished and used in violation of the Act."

Mr. Roberts, who was then Commerce Counsel and is now Vice President and General Counsel for the Frisco System, notwithstanding his views as to the correct rule on this subject, had previously stated (p. 1209):

> "Proof that the cars became uncoupled without human intervention will undeniably tend to show such negligence, but to secure the benefits mentioned above, it is frequently attempted to prove that such negligence was more than mere common-law negligence; it is sought to characterize the use of cars which will and do uncouple inopportunely and without human intervention as *per se* an act in violation of the statute. This construction of the statute is not without judicial sanction. The Second Circuit Court of Appeals, for example, flatly declares that 'the purpose of the statute is aimed at keeping men out of the space between the cars, *but it is also aimed at insuring couplers that will hold together*' (italics ours).

> So also, Chief Justice White, speaking for the national Supreme Court, in affirming a judgment for plaintiff in a death action under the federal Employers' Liability Act, took occasion to mention 'the positive duty imposed by the statute (Safety Appliance Act) upon the railroad to furnish *safe* appliances for the coupling of cars' (italics ours), and in that case the only evidence of a breach of statutory duty on the part of the carrier was proof of an undesired and unexplained opening of the couplers between two cars of a moving train. Similarly the Arizona court, in a case of this same character, observed: 'The operative condition of the couplers involved in this case was not maintained, so that they would remain coupled during the haul of the train, and hence the Safety Appliance Act was violated,' and the Supreme Court denied a writ of certiorari to review the judgment against the carrier."

It will be observed that the interpretation of the Safety Appliance Act by Mr. Chief Justice White in the *Gotschall* case is directly in conflict with the views expressed by Mr. Roberts to the effect that while the jury may infer from the breaking of a coupler that it was "used in violation of the act", such a breaking is not *per se* an act in violation of the statute. The defendant cheerfully accepts and adopts Mr. Roberts' opinion as to what constitutes the "true rule", thereby incidentally overruling the unanimous opinion of this court as expressed by Mr. Chief Justice White. The Court of Appeals goes a step further and holds that the Safety Appliance Act does not even require the railroads to furnish couplers that "would not break".

This court's decision in the *Scarlet* case, 249 U. S. 528, holding that the breaking of the king pin of the coupler and the coupling chains did not establish as a matter of law negligence or a violation of the Boiler Inspection Act (45 U.S.C.A. § 23) is directly in conflict with every

case decided by this court prior to and since its rendition, commencing with the *Taylor* case, 210 U. S. 281, 294, decided in 1908, down to and including the *Coray* case, 335 U. S. 520. The opinion in the *Scarlet* case, we submit, is applicable only to cases arising under the Federal Employers' Liability Act (independently of the Safety Appliance Acts). The two cases cited and relied on (*New Orleans, etc., R. Co.* v. *Harris*, 247 U. S. 367, and *Yazoo* v. *Mississippi Valley R. R. Co.* v. *Mullins*, 249 U. S. 531) to support the court's conclusions were actions under the Federal Employers' Liability Act, not under the Safety Appliance Act. The court held in these cases that the so-called *prima facie act* of Mississippi could "not constitutionally be applied to suits under the Federal Employers' Liability Act * * *; that it relieved the plaintiff of the burden of proof to establish negligence" and that the defendant's rights were thereby prejudiced.

The court's action in reversing the judgment in the *Scarlet* case could be sustained on this ground alone, since *prima facie* acts or the scintilla of evidence rule are not applicable in actions brought under the Federal Employers' Liability Act. Nor does the burden of proof ever shift in such cases.

## III.

While respondent's argument under this heading contains isolated excerpts from the instructions, it does not present a fair or accurate picture of the charge as a whole. Nowhere was the jury told that negligence was not an element of the safety appliance violation charge. The excerpt which respondent quotes at page 21 of its brief has to do with contributory negligence on the part of decedent and not with negligence of the defendant. On the contrary, the jury were repeatedly told that the plaintiff must prove that the defendant was guilty of neg-

ligence; that it was not sufficient to show that the defendant may possibly have been guilty of negligence but that the evidence must point to that fact.

While the court instructed the jury that if they found the defendant guilty of the violation of the Federal Safety Act and that such violation was the proximate cause of decedent's death, his contributory negligence would not bar the plaintiff's right to recover, nowhere did the court even remotely suggest or advise the jury that the violation of the statute was negligence *per se* or that the jury had the right to infer negligence therefrom. Under the court's instructions, the jury was required to find before the plaintiff could recover, that the breaking of the coupler was (1) a violation of the statute and (2) that the breaking was caused by defendant's negligence.

There is nothing in the record to indicate that the jury ever reached or considered at all the question of causal relation. The court instructed the jury that "the fact of an accident" or "the mere happening of an accident by which decedent lost his life does not in and of itself create a liability upon the defendant to pay for it • • •" and "carries with it no presumption of negligence on the part of defendant" (R. 187-189). Under the court's instructions the question whether the decedent was killed on the first movement when the coupler broke or on the second movement, as defendant now contends, became immaterial insofar as the defendant's liability was concerned. Had the jury concluded that the decedent was killed on the first movement (which they unquestionably did since there was no probative evidence upon which to base any other conclusion) they would, nevertheless, under the court's instructions be compelled to find the defendant not guilty. Our proffered instructions (R. 261, 262) which, with others identical in substance, were refused directing the jury that the breaking of the coupler as shown

by the evidence was a violation of the Safety Appliance Act and that if they found from a preponderance of the evidence that the decedent came to his death as a result thereof they should find the defendant guilty, stated the law correctly and embraced all the facts essential to the plaintiff's right to recover.

Both the Court of Appeals in its opinion and the defendant in its brief (pp. 26, 27), assert that the instruction at R. 189 has to do with proximate cause, and not with inferences of negligence. The opening sentences of the instruction are:

> "Now, as I have told you in the beginning, the fact of an accident carries with it no presumption of negligence on the part of the defendant. That is an affirmative fact for the plaintiff to prove."

There is not a word about proximate cause in the quoted language. It all has to do with negligence, and with the inferences which may be drawn from an accident. Where in this record is there any justification for the assertion that this language refers to proximate cause?

Counsel goes further and says (p. 27), that the "accident" referred to in the instruction is the running over of the decedent, and not the breaking of the coupler. Where does this appear? Where was this invidious distinction explained to the jury? How were they to know what accident was referred to in the instruction? Defendant cannot get away from the fact that in a Safety Appliance Act case, the jury were told that they could not infer negligence from the mere happening of the accident, which is incorrect even under the theory adopted by the Court of Appeals and urged by the defendant.

Respectfully submitted,

JOSEPH D. RYAN,
Attorney for Petitioner.

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CHARLES ELMORE CROPLEY
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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949.

## No. 56

**SARAH O'DONNELL, Administratrix of the Estate of WILLIAM O'DONNELL, Deceased,**
**Petitioner,**

vs.

**ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,**
**Respondent.**

## BRIEF IN OPPOSITION TO MOTION TO DISMISS.

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949.

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## No. 56

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**SARAH O'DONNELL, Administratrix of the Estate of WILLIAM O'DONNELL, Deceased,**
**Petitioner,**

**vs.**

**ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,**
**Respondent.**

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## BRIEF IN OPPOSITION TO MOTION TO DISMISS.

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It is our understanding of the practice in this court that it is not necessary for the petitioner, whose petition has been granted, to file any further papers in connection with his case, unless he desires to do so.

In Appellate Practice & Procedure in the Supreme Court of the United States, by Robertson, which we had heretofore regarded as authoritative, and had followed, we find the following, p. 77:

"BRIEF ON THE MERITS.—Upon the granting of a writ of certiorari the petitioner may (1) stand upon the brief filed in support of his petition, (2) file a complete new brief at any time up to three weeks before the argument of the case, or (3) file a new brief as a supplement to the brief filed in support of the petition.

"When the case has been reached for argument the petition for the writ and the brief filed in support of it will be before the Court, and if it is felt that the ground has been amply covered in these papers it is not necessary to file new briefs."

We have not been able to find anything in the Rules, or in the decisions of this Court, in conflict with the procedure indicated in the foregoing citation.

There is no rule requiring that the Clerk or opposing counsel be notified of petitioner's intention to rely on her petition. That fact would become obvious from the moment that a further brief was due, if it were not filed. Serving notice that petitioner was not filing another brief would be an idle ceremony.

In any event, counsel has cited no rule indicating within what time he should be notified that petitioner intends to stand on the brief accompanying her petition. We therefore now state that petitioner desires to stand on the briefs accompanying her petition, and submit that neither our petition nor the writ of certiorari heretofore issued herein should be dismissed.

Respectfully submitted,

JOSEPH D. RYAN,
Attorney for Petitioner.

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FILED
MAY 23 1949
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CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, ~~1948.~~ 1949

No. [redacted] 56

SARAH O'DONNELL, Administratrix of the Estate of WILLIAM O'DONNELL, Deceased,
*Petitioner,*

*vs.*

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,
*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1948.

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**No. 743**

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SARAH O'DONNELL, Administratrix of the Estate of WILLIAM O'DONNELL, Deceased,

*Petitioner,*

*vs.*

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,

*Respondent.*

---

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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### ADDITIONAL STATEMENT OF THE CASE.

#### The Real Question Upon Which This Case Was Tried.

This is the rare case in which a jury returned a verdict for the defendant in a death action under the Federal Employers' Liability Act, a verdict which demonstrates the truth of Mr. Justice Black's statement in *Wilkerson* v. *McCarthy*, No. 53, decided January 31, 1949, 69 S. Ct. 413 at 417, that the "unarticulated assumption • • • that juries will invariably decide negligence questions against railroads • • • is contrary to fact."

The petition for writ of certiorari would make it appear that the issue upon which this case was tried and argued to the jury was whether the plaintiff was re-

quired to prove negligence in fact in addition to the violation of the Safety Appliance Act. But that was not the issue upon which the case was tried and argued to the jury. The theory of the defense was that the decedent was not killed on the movement in which the coupler broke, as plaintiff contended, but, rather, that he was killed on the final movement out of the yard, as to which no negligence or other ground of liability was charged. This was clearly stated to the jury in the opening statement of defendant's counsel (Tr. 25, 26) and it was this contention which he argued at length in his closing argument to the jury (Tr. 157, 161-171). Since there were no eyewitnesses to the fatal accident, and more than an hour elapsed from the time the decedent was last seen alive until his body was found, during which time the two movements had been made (Tr. 97-98), the question was clearly for the jury, under the rule stated in *Lavendar* v. *Kurn*, 327 U. S. 645. The "historic function" of the jury to decide this purely factual question was observed in this case, and both the district court, on the motion for new trial, and the court of appeals, on the appeal, have upheld the jury's verdict.

The contention of the petitioner, however, is that the basic question of negligence on her version of the accident should have been taken from the jury, by a peremptory instruction that the breaking of a coupler was negligence *per se*, and conclusive evidence of a violation of the Safety Appliance Act. This is not the law, nor does it accord with the view so frequently expressed by this court in the past decade that where different inferences can be drawn, the choice between them is for the jury. The defendant contends here, as it did in the courts below, that it was for the jury to determine first, in which movement was the decedent killed, and second,

but only if they found he was killed in the first movement, whether the defendant was guilty either of negligence or of a violation of the Safety Appliance Act because a coupler broke in a "very violent stop."

## SUMMARY OF THE ARGUMENT.

### I.

**The questions urged in the petition for certiorari are not the real issues upon which this case was tried and argued to the jury.**

1. See opening statement of plaintiff's counsel (Tr. 21), the opening statement of defendant's counsel (Tr. 25) and the closing argument of defendant's counsel (Tr. 157, 160-169).

2. It was the function of the jury to determine from the circumstantial evidence whether the decedent was killd on the first movement (as contended by the plaintiff) or on the final movement out of the yard (as contended by the defendant).

*Wilkerson* v. *McCarthy*, No. 53, October, 1948, Term, 69 S. Ct. 413;
*Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, 35;
*Lavendar* v. *Kurn*, 327 U. S. 645;
*Lilly* v. *Grand Trunk R. Co.*, 317 U. S. 481, 491.

### II.

**The principle that the fact that a coupler breaks is evidence from which a jury may infer, but is not compelled to find negligence or a violation of the Safety Appliance Act is authoritatively settled by decisions of this Court.**

*Minneapolis etc. R. Co.* v. *Gotschall*, 244 U. S. 66;
*New Orleans etc. R. Co.* v. *Scarlet*, 249 U. S. 528.

1. Since these authoritative decisions, both state and federal courts have uniformly held that the breaking of a coupler does not demand a finding that the couplers

## III.

**No substantial question, warranting review by this Court, is presented by any properly preserved objection to the trial court's charge to the jury.**

"No party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider the verdict, stating distinctly the matter to which he objects and the grounds of his objection."

Rule 51, Rules of Civil Procedure.

"In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial."

*Palmer* v. *Hoffman,* 318 U.S. 109, 119.

1. The court properly instructed the jury on the provisions of the coupler state, and left to the jury the question of fact whether the coupler which broke violated the statute.

See cases cited under Point II.

2. The instructions did not confuse negligence with the charge of violation of the Safety Appliance Act.

See Argument.

3. The court properly instructed the jury they could not presume from the fact of the accident that the decedent was killed because of the broken coupler.

*Brady* v. *Southern Ry. Co.,* 320 U.S. 476, 484;
*Tennant* v. *Peoria & P. U. Co.,* 321 U. S. 29.

## ARGUMENT.

### I.

**The contentions raised by the petition for certiorari are not the real issues upon which this cause was tried and argued to the jury.**

The contentions argued in the petition for writ of certiorari—whether the breaking of a coupler is "negligence *per se*" or *conclusive* evidence of a violation of the Safety Appliance Act, and whether the jury was fully instructed on every facet of this issue—were not the issues upon which this case was tried and argued to the jury.

From the time the decedent was last seen by his brother, the foreman of the crew, until his body was found, more than an hour later, by the same brother, there had been only two movements along the track where his body was later found. The issue upon which this case was tried was whether the fatal accident occurred in the *first* of these movements, in which the coupler broke, and as to which plaintiff charged both negligence and a violation of the Safety Appliance Act, or in the *second* movement, as to which no negligence of any kind was charged. The directly opposite contentions of the parties were clearly stated in the opening statements to the jury. Plaintiff's counsel said:

> "So, it is our contention that the conclusion is inevitable that the time he was run over and killed, as shown by the physical facts and circumstances, was when the coupler broke loose while he was engaged in the course of his duties between the cars, and that the defective coupler was the proximate contributing cause of this accident." (Tr. 21).

footnote references to the testimony which supports the argument of defendant's counsel:

1. The presumption that the decedent, knowing the next move was to be made into this track, would not knowingly put himself in a position of danger between the cars.[1]

2. The fact that all the open couplers of the cars at the west end of the track coupled up following the impact, indicated that at the time of the impact, the deceased had reached a point about 200 feet east of the place at which plaintiff contends he was standing.[2]

---

[1] The decedent had been continuously in the employ of the defendant 23 or 24 years and had worked on this particular job about two years. (Tr. 63) Jack O'Donnell, his foreman, told decedent, just before he went down to track 5 (where the accident occurred) that he had one car for track 5, the balance to go to track 1 and the set-backs on track 2. (Tr. 36, 79). The presumption that the deceased exercised due care for his safety having this knowledge, was a proper circumstance for the jury's consideration. **Tennant** v. **Peoria & P. U. Ry. Co.**, 321 U. S. 29, 34. See defendant's argument on this point at Tr. 161-162.

[2] Starting from the west end of track 5, there were cars coupled together, then a space of about a car length, between the third and fourth cars, then a little gap, then the fifth and sixth cars then a gap between them and the remainder of the train. (Tr. 37, 78). These cars had failed to couple upon earlier movements into track 5, and presumably the drawbars were out of alignment or the knuckles were closed. (Tr. 37, 70). It was this situation which the decedent went to track 5 to correct. (Tr. 38). Starting from the west end of the track, as he did, the first coupler which he would adjust was on the east end of the third car from the west, where plaintiff contends he was standing when the impact occurred. The fact that all the couplers "made" on that impact tended to show that he had completed the adjustment of the couplers on the fourth, fifth and sixth, and possibly the seventh car, which would place him at least 200 feet farther east. No reason is suggested in the record why, if he had completed the adjustment of the most easterly open coupler he would go back to the most westerly opening where, presumably, he had already made the adjustment. See defendant's argument at Tr. 162.

3. Although Jack O'Donnell knew the exact sequence and timing of the movements made, there was nothing about the breaking of the coupler which suggested to him that any harm might have resulted to his brother from the movement in which the coupler broke.[3]

4. Jack O'Donnell did not see any body or any indication of an accident when sometime after this first movement, he walked down along the north side of the cars on track 5, flashing his lantern in between the cars to see if all the couplings had made. He walked "right alongside the track" for a distance of ten carlengths, right past the spot where his brother's body was later found and where, if he had been struck by the first movement, his body must have been lying along the north rail in the space between two of the cars where Jack flashed his lantern.[4]

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[3] Jack O'Donnell's testimony on cross-examination, was:

"Q. You knew your brother was somewhere down in that vicinity or at least he had gone down track 5 at the time you were moving this cut of cars out of track No. 2?

A. Yes.

Q. But there was nothing about that incident as it happened there that aroused any suspicion in your mind that anything might have happened to him in the course of the movement which had just been made at that time?

A. That is true." (Tr. 90).

Defendant's argument on this phase of the case is set forth at Tr. 163.

[4] See the testimony of Jack O'Donnell at Tr. 47, 48, 92, 93. If, as plaintiff claims, the decedent was struck as he attempted to adjust the coupler on the east end of the third car, then since the impact moved the cars about a carlength (Tr. 89) and the drag marks along the track show his body was dragged 45 feet (Tr. 54, 125), which was the average length of the cars they were handling that night (Tr. 31), his body would have been right at the opening between the two cars and, we submit, Jack O'Donnell could not possibly have failed to see the body or the drag marks out-

259-264), the objections to the instructions given (Tr. 194), the motion for new trial (Tr. 216-219, 221), or the statement of points relied upon (Tr. 224-230) qualified the fact of breaking by the phrase "in normal use" or any equivalent languge. But passing that question and coming to the merits of plaintiff's contention, we think that the language of the statute itself, and the decisions of this Court have settled for more than thirty years the rule that the fact that a coupler breaks while in use is evidence from which a jury *may infer* that the coupler did not comply with the statute, but is not *conclusive* evidence of such a violation.

Unlike other provisions of the Safety Appliance Act, which require the carrier to use "safe" or "efficient" or "secure" devices and appliances (45 U. S. C. A. 33, 4, 11, 23), the coupler provision of the Safety Appliance Act imposes a specific functional test: that the couplers shall "couple automatically by impact" and "can be uncoupled without the necessity of men going between the ends of the cars" (45 U. S. C. A. §2). The evils against which the statute was directed were those which attended the old-fashioned link and pin couplings and the purpose of the statute was to enable employees to couple and uncouple cars without going between the ends of the cars. *St. Louis and S. F. R. Co.* v. *Conarty*, 238 U. S. 243, 250. The only absolute duty imposed on the carrier is that the coupler shall comply with this specific functional test; there is no absolute duty that the coupler shall not break while in use, whether in normal use or in a very violent stop.

More than thirty years ago, in *Minneapolis etc. R. Co.* v. *Gotschall*, 244 U. S. 66, in a unanimous opinion by Mr. Chief Justice White, this Court held that

> "in view of the Safety Appliance Act, negligence *might be inferred* from the mere opening of the couplers." (Emphasis supplied.)

Two years later in *New Orleans etc. R. Co.* v. *Scarlet,* 249 U. S. 528, this Court, in an opinion by Mr. Justice Brandeis, decided the precise question which plaintiff seeks to argue again here. In the *Scarlet* case, the accident was caused by the breaking of the king pin of the coupler and the coupling chains between the engine and the tender (249 U. S. at 529). In the trial court plaintiff had relied upon the state "*prima facie* act" as dispensing with proof of negliegnce; on appeal it was conceded that this error, as held in *New Orleans etc. R. Co.* v. *Harris,* 247 U. S. 367, and the judgment in plaintiff's favor must be reversed unless the error was harmless, as plaintiff contended, because "the mere breaking of the king pin and coupling chains shows conclusively that they were defective" and therefore violated the absolute duty imposed by the Boiler Inspection Act (45 U. S. C. A. §23), one of the Safety Appliance Acts. This is precisely the contention advanced by the plaintiff here. This Court held (p. 530):

> "• • • it is clear that the evidence did not establish as a matter of law that the king pin or the chains were defective. At most it presented a question for the jury. Compare *Minneapolis & St. Louis R. R. Co.* v. *Gotschall,* 244 U. S. 66."

Following these decisions, the courts have uniformly held that the breaking of a coupler "does not demand a finding that the couplers were defective," but "at most presented a question for the jury." *Western & Atlantic R. R.* v. *Gentle,* 58 Ga. App. 252, 198 S. E. 257, certiorari denied, 305 U. S. 654; *Vigor* v. *Chesapeake & O. Ry. Co.* (C. C. A. 7), 101 F. 2d 865, 869, certiorari denied, 307 U. S. 635; *Cochran* v. *Pittsburgh & L. E. R. Co.* (D. C.

v. *Eisenhart* (C. C. A. 3), 280 Fed. 271.[9] The fact that in these cases the jury decided the issue for the plaintiff does not mean that the issue must always be withheld from the jury and decided by the court.

The supposed "conflict" upon which plaintiff relies for allowance of the writ is, as Mr. Roberts pointed out twenty years ago, merely "a conspicuous illustration of the dangers incident to so sweeping a generalization"; the "true rule to be deduced from the cases" is that "proof that the cars became uncoupled while in use, without human intervention, either because the coupler or some part thereof broke, or for some unexplained reason, is evidence from which a jury is *entitled to infer* that the coupler was not in condition to perform the function required of it by the statute, and hence that the Act was violated." (Emphasis supplied.) Roberts, Federal Liabilities of Carriers (2nd ed., 1929), Sec. 620; *Vigor* v. *Chesapeake & O. Ry. Co.* (C. C. A. 7), 101 F. 2d 865. Even evidence that upon a particular movement, a coupler failed to couple automatically by impact, or to uncouple at the first attempt is merely evidence from which a jury may properly find that the statute was violated. *Penn* v. *Chicago & N. W. Ry. Co.*, 335 U. S. 849, reversing 163 F. 2d 995; compare *Myers* v. *Reading Co.*, 331 U. S. 477. The fact that the coupler broke is no more conclusive evidence than this. The question is for the jury, not for the court to determine by peremptory instruction for either party.

The issue which plaintiff seeks to raise by her petition for certiorari has long been settled adversely to her con-

[9] "For evidence of negligence in support of the counts under the Safety Appliance Act, the plaintiff relied upon the inference of a defective coupler, drawn from the fact that the couplers uncoupled * * * * * the case was properly submitted and the verdict should be sustained on the inference of defendant's negligence to be drawn from the mere opening of the couplers." 280 Fed. at 272, 275.

tentions by the decisions of this court, and has been understood and followed by federal and state courts. The courts below followed and properly applied the rule. No useful purpose would be served by reviewing the question again.

## III.

**No substantial question, warranting review by this Court, is presented by any properly preserved objection to the trial court's charge to the jury.**

Petitioner's mistaken belief that the breaking of a coupler is negligence *per se,* and the fact that a coupler breaks conclusively establishes a violation of the Safety Appliance Act permeates her criticism of the court's instructions and the argument of defendant's counsel. As we pointed out in our Additional Statement of the Case and under Point I of our Argument, the principal question argued to the jury by defendant's counsel was that the decedent was killed in the final movement of the cars out of this yard, as he was either attempting to climb between the cars, as the men often did (Tr. 93, 103), or as he was riding the cars down to the switchmen's shanty, as was his habit (Tr. 96). We believe that when a jury decides a case like this for the defendant, they do so because they accept the version of the accident for which defendant's counsel contends. If, as we believe, this jury concluded that the decedent was killed in the final movement out of the yard, then the breaking of the coupler had nothing whatever to do with his death, and nothing in the court's instructions nor the argument of defendant's counsel about the legal significance of the breaking of the coupler could have in any way affected the outcome of this case. However, upon plaintiff's theory that he was killed in the earlier movement, we submit the jury was correctly instructed and the case was fairly tried.

"That is the statute. Now, that statute places upon the railroad engaged in the type of business that this railroad was engaged in at the time of this occurrence an absolute duty to provide the couplers which I have just read to you from the statute, and to provide them in such order as the statute indicates."

and, a little later (Tr. 188):

"Now, if you believe from a preponderance of the evidence, and I will tell you what that means in a little while, under the instructions of the Court, that the defendant, at the time and place in question, used and operated a car with a defective coupler, contrary to the provisions of the Federal Safety Appliance Act, and that said coupler broke, and that as a direct and proximate result thereof, the plaintiff's decedent sustained injuries which resulted in his death, then you may find the defendant guilty. But as I said before, in the event you find that such violation of the Federal Appliance Act is the proximate cause of his death, then negligence or contributory negligence on the part of the decedent is entirely immaterial and does not affect his right to recover the amount of damages."

This latter portion of the charge is substantially as requested by plaintiff's proposed instruction No. 5 (Tr. 261) with the correct substitution of "may find" for the peremptory "should find." Under the cases we have cited, these portions of the charge properly submitted to the jury the question whether the coupler violated the test of the statute.

These instructions did not leave to the jury any legal question as to the construction of the statute. The court told the jury just what the statute provides; that the railroad was under "an absolute duty" to provide such couplers; and that if the defendant used and operated a car with a defective coupler, contrary to the statute, and

the coupler broke, and as a direct and proximate result thereof, plaintiff's decedent came to his death, they might find the defendant guilty. While this charge does not embody plaintiff's mistaken notion as to the applicable rule of law, the charge does state the correct rule, and left to the jury's determination the two basic questions of fact: first, did the coupler comply with the statute, and second, did the broken coupler cause the man's death. The court would not have been justified in embellishing the statute by referring to "safe coupling devices" or generalizing abont "defective couplers." The statutory test is simple and readily understandable; no further explanation than the words of the statute was necessary, nor, for that matter, was any such elaboration ever requested by the plaintiff in the trial court.

In his dissenting opinion in the court of appeals, Judge Minton predicates error on the failure of the trial court to instruct the jury that it might infer negligence from the breaking of the coupler. Judge Minton recognized that plaintiff did not object to this failure to instruct as required by Rule 51 and the well-settled federal appellate practice. (Tr. 250; 171 F. 2d at 978). But in plaintiff's petition for rehearing in the court of appeals, her counsel insisted "it was not our theory in the trial court, nor is it in this court, that the breaking of a coupler is merely ground for an inference of a violation of the Act." Petitioner has not only waived in the trial court any right to rely upon the proposition advanced by Judge Minton, but she expressly repudiated it in the court of appeals. We think we need not concern ourselves further with Judge Minton's theory.

Finally, petitioner argues that defendant's counsel misstated the law as to the carrier's duty with reference to couplers in his argument to the jury. Inasmuch as plaintiff's counsel had argued that the statutes "make the rail-

road company absolutely liable in this case if a coupler broke" (Tr. 146), we think the argument of defendant's counsel properly directed the jury's attention to the language of the statute as the court had stated he intended to, and later did charge the jury. The court's ruling:

> "The jury will be governed by what the court instructs them as to the law and not what counsel says * * * you will take your instruction as to the law from the court" (Tr. 146)

removed any possibility of prejudicial error from any misstatement of either counsel as to the law. The court also pointed out to plaintiff's counsel that "you will have a chance to protest when you answer him" (Tr. 159). When his chance came, he dismissed it summarily with "I don't have to waste time discussing it" (Tr. 177). There is no reviewable error in this to warrant the attention of this Court.

2. *The instructions did not confuse negligence with the charges of violation of the Safety Appliance Act.*

The complaint originally charged five "negligent acts" (Tr. 5), two of which, (d) and (e), were withdrawn by the plaintiff at the close of the case (Tr. 139) and one of which, (c), was amended (Tr. 13). The charges which went to the jury were that the defendant:

> "(a) Carelessly and negligently propelled and impacted two or more of the said cut of cars upon and against the cars projecting out on the west rip lead at the place aforesaid.
>
> "(b) Carelessly and negligently failed to equip and maintain on the cars standing on No. 5 rip track, couplers which would couple automatically by impact without the necessity of men going between the ends of cars, contrary to the provisions of the Safety Appliance Act.
>
> "(c) Carelessly and negligently failed to equip and maintain on one of the cars being moved along

> the said track, a safe and efficient coupler which would remain coupled to the car to which it was attached, but which, on the contrary, was so defective and insecure that it broke loose from said car, contrary to the provisions of the Federal Safety Appliance Act."

Plaintiff's tendered instruction No. 1 repeated these charges, omitting only the word "carelessly" (Tr. 260). Thus the plaintiff herself posed her case on charges that the defendant "negligently" violated the Safety Appliance Act, in addition to ordinary negligence in the movement of the cars.

The trial judge, however, carefully drew the distinction between the two charges in his instructions. In summarizing the allegations of the complaint, he pointed out that the second and third "acts of negligence which she charges" were the failure to equip and maintain the described couplers (Tr. 183); he pointed out that these allegations "charge specific acts in violation of the Federal Safety Appliance Act" (Tr. 183); that the defendant was under "an absolute duty to provide the couplers • • • in such order as the statute indicates" (Tr. 186); that the first determination to be made by the jury was "whether or not the defendant is guilty of one or more or all of these acts of negligence" (Tr. 187); that contributory negligence must be considered on the first charge but that as to the charges of violation of the Safety Appliance Act, "contributory negligence does not enter into it at all" and "has no bearing whatever in this matter" (Tr. 187); and, finally, that if they believed that the defendant "used and operated a car with defective coupler, contrary to the provisions of the Safety Appliance Act, and that said coupler broke", which caused the death of plaintiff's decedent, "then negligence or contributory negligence • • • is entirely immaterial and does not affect his right to

recover" (Tr. 188). Notwithstanding the fact that under both the allegations of her complaint and her tendered instructions, plaintiff would have been required to prove that the defendant "negligently" used a coupler which violated the statute, the trial judge, in his instructions to the jury, carefully drew the distinction between the charge of ordinary negligence and the charges of violation of the coupler statute. He told the jury that the use of a coupler which violated the statute in itself was the act of negligence charged in the second and third specifications of negligence; that if the jury found the defendant used such a defective coupler and the coupler broke "negligence is entirely immaterial." Certainly these instructions told the jury that the use of a coupler which violated the statute was an act of negligence and in itself sufficient to impose liability upon the defendant if the broken coupler caused the man's death; to add that it was also "negligence *per se*" could not have aided a jury of average American citizens.

Petitioner argues that the court's "charge as a whole" would lead the jury to understand that "plaintiff had to prove negligence" and that "this requisite was not confined, as it should have been, to the first charge of negligence, but applied as well to the charges of violation of the Safety Appliance Act." But no such objection to the "whole charge" was taken in the trial court, and "where part of the charge was correct he may not through a general exception obtain a new trial." *Palmer* v. *Hoffman*, 318 U. S. 109, 199. Moreover, as concerns the "charge as a whole," we submit that the court of appeals correctly pointed out (Tr. 248; 171 F. 2d at 977):

> "Moreover, upon examination of all the instructions given, we find that the court correctly explained to the jury, the issues and the law applicable thereto. He told the jury that if they found the coupler did not

comply with the requirements of the statute and that as a result O'Donnell had been killed in the movement which followed, they could find defendant guilty. He distinctly and in express terms called attention to the three grounds of liability charged, and the statutes involved. He defined negligence, proximate cause, the preponderance of the evidence and instructed them as to the limited extent to which contributory negligence entered into the issues. Under these circumstances we do not believe that the instructions considered as a whole were erroneous."

3. *The court properly instructed the jury on the question of proximate cause.*

Petitioner also complains of that portion of the charge by which the jury was instructed that the mere happening of the accident by which the decedent lost his life does not in and of itself create a liability upon the defendant; that the fact of such an accident carries no presumption of negligence; that the evidence must point to the fact that the defendant was guilty of one of the three allegations of negligence in plaintiff's complaint; that they could not guess between the various causes of the accident and find that the negligence charged was the proximate cause of the accident if there was no satisfactory foundation for such a conclusion.

These portions of the court's charge do not tell the jury that they may not infer either negligence or a violation of the statute from the breaking of the coupler. This instruction has nothing to do with inferences of negligence; as the court of appeals pointed out (Tr. 248, 171 F. 2d at 977):

'The criticized instruction is directed to the question of proximate cause. It correctly cautioned the jury that they could not presume from the fact of the acci-

dent that O'Donnell was killed because of the breaking of the coupler. *Brady* v. *Southern Ry. Co.*, 320 U. S. 476, 483."

The "accident" referred to in this instruction is not the breaking of the coupler, but is the running over of the decedent. The real issue in this case was whether the accident in which O'Donnell was killed occurred on the first movement, as to which negligence was charged, or on the final movement out of the yard. The fact that he was accidentally killed did not give rise to any presumption that it was one movement rather than the other. Liability arises from negligence; not from the mere fact of injury. *Brady* v. *Southern Ry. Co.*, 320 U. S. 476, 484. Mere speculation cannot do duty for probative facts. *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29. The challenged instruction properly protected the defendant against a verdict based upon sympathy and guess-work. Petitioner's criticism wholly misunderstands the subject matter of this instruction.

## CONCLUSION.

This is not a case in which plaintiff was "deprived of all benefit of the Safety Appliance Act." It is simply a case in which plaintiff's counsel failed to convince the jury that the decedent was killed in the movement in which she charged the Safety Appliance Act was violated.

We think plaintiff lost her case not because the jury were in any way confused about the absolute duty imposed by the coupler statute or the probative force to be given to the fact that a coupler broke, but because her counsel could not explain to the jury how, if William O'Donnell were struck by the first movement of cars, his

brother Jack could walk "right alongside the track" past his brother's body and not see it. The jury found that he was not killed as the result of the broken coupler and not one of the errors charged here could bave affected that verdict. And even if the jury concluded that the broken coupler was not a violation of the specific functional test of the statute, that was their prerogative. The plaintiff had a full and fair trial, the errors complained of did not affect its outcome and the verdict of the jury approved by both courts below should not be disturbed.

Respectfully submitted,

HARLAN L. HACKBERT,
*Attorney for Respondent.*

KNAPP, CUSHING, HERSHBERGER
AND STEVENSON,
Of Counsel.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1949.

## No. 56

SARAH O'DONNELL, Administratrix of the Estate of WILLIAM O'DONNELL, Deceased,

*Petitioner,*

*vs.*

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,

*Respondent.*

## MOTION TO DISMISS
## and
## BRIEF AND ARGUMENT OF RESPONDENT

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IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

**No. 56**

SARAH O'DONNELL, Administratrix of the Estate of WILLIAM O'DONNELL, Deceased,

*Petitioner,*

*vs.*

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,

*Respondent.*

## MOTION TO DISMISS AND BRIEF AND ARGUMENT OF RESPONDENT

Petition for writ of certiorari was granted June 13, 1949. Petitioner has filed no brief in accordance with Rule 27 and the time for filing such brief has long since passed. Petitioner has given no notice either to the clerk or to opposing counsel that she desires to have her petition for writ of certiorari stand as her brief. Accordingly, the respondent submits that the petition for writ of certiorari should be dismissed for failure to comply with the rules of this Court, or, in the alternative, that the writ be dismissed as having been improvidently granted.

In the event the motion to dismiss be denied, petitioner appends hereto its brief and argument for the consideration of the court.

Respectfully submitted,

Harlan L. Hackbert,
Attorney for Petitioner.

## STATEMENT OF THE CASE

This is rare case in which a jury returned a verdict for the defendant in a death action under the Federal Employers' Liability Act, a verdict which demonstrates the truth of Mr. Justice Black's statement in *Wilkerson* v. *McCarthy*, No. 53, decided January 31, 1949, 69 S. Ct. 413 at 417, that the "unarticulated assumption * * * that juries will invariably decide negligence questions against railroads * * * is contrary to fact."

We adopt the statement of facts in the opinion of the Court of Appeals (Tr. 224-46; 171 F. 2d 973, 974):

> "The decedent was a switchman employed by defendant and on the night he met his death was working in defendant's yards at Gary, Indiana. The decedent's brother was the conductor-foreman of a switching crew engaged in making up a train of cars on what was known as Track 5. In this yard the lead tracks and the terminal and rip tracks ran in a general east and west direction. Branching off from these tracks in a northeasterly direction were Tracks 1 to 6. From the latter tracks the switching crew was switching cars out upon the lead tracks. As the cars were sorted out on the leads, they were switched into the proper track. There were some 43 cars in on Track 5, filling it from the west to the east. The last three cars pushed in towards Track 5 did not couple to each other nor to the cut of cars already on that track. One car stood about a car length west of the cut, just at the point where a safety sign had been lowered. It was customary to raise this sign in warning when repairs were being made on the track and to fold it down between the rails when no warning was necessary. The other two cars stood west of the single car. The decedent and his brother were standing along Track 1 near the switch when decedent's brother told decedent he was going to pull some cars from Track 1 onto the lead track; the most easterly of these

cars was to be switched into Track 5 and the others into another track. The decedent, in preparation for this movement, went to line up the couplings of the three cars that had not been coupled to the cut of cars on Track 5. This is the last time that he was seen alive.

"The decedent's brother started the switching operation, to put the car into Track 5. This operation, referred to as the first movement, took four or five minutes. This gave decedent sufficient time to walk to the uncoupled cars on the west end of Track 5 and attend to the lining up of the coupling. The cut of cars in the switching operation moving eastwardly toward Track 5, reached a speed of ten miles an hour. As it neared Track 5, decedent's brother gave two successive stop signals but, for some reason not apparent on the record, these signals were not obeyed. The conductor then gave an emergency stop signal, and the cars came to a sudden stop. When the sudden stop was made, the coupler on the west end of the second car from the east end of the cut broke, allowing the two easterly cars to run free and collide under their momentum with the uncoupled cars on Track 5. The violent impact coupled the cars in succession as they moved eastwardly until the most easterly car was coupled to the most westerly car of the cut already on Track 5. This indicated that the decedent had by this time properly aligned the couplers as he had set out to do.

"Shortly after the breaking of the coupler and the collision, decedent's brother proceeded along the north side of Track 5 eastwardly for about ten car lengths, examining the couplings to see if they had all been properly made. His examination was made by turning the light from his electric lantern upon each coupling as he passed along. In addition to his lantern light, the yard was lighted up by a floodlight from the top of a coal chute to the southeast of Track 5. The floodlight cast the car's shadow towards the north. The

cars extended two feet or more out over the rail. When decedent's brother satisfied himself that the couplings were made, he boarded the engine, rode around to the east end of the cut of cars on Track 5, coupled the engine, and moved the cars out east into the terminal yard.

"After this movement, referred to as the second movement, decedent's brother returned to the switchmen's shanty and not finding decedent there, went out to the east end of Track 1 looking for him. Not finding decedent at that point he returned to the shanty. About an hour had elapsed since decedent had been last seen, and his brother became alarmed. Again he went out, searching in the eastern part of the yard as decedent often rode the cars down to the east end when his work in the west part of the yard was completed. The engineer was walking west in the yard when decedent's brother met him and inquired if he had seen decedent. The engineer replied in the negative, and the two proceeded westwardly along the north side of Track 5 until about 15 car lengths east of the west switch on Track 5. The engineer continued westward along Track 5, and decedent's brother turned north to search again on Track 1. Finding no trace of decedent there, he turned back to Track 5 and proceeded westwardly to about a car length east of the safety sign. The decedent's body was found there, lying north of the north rail, close up against it, the right arm and leg severed on the north rail, and the face cut off. The sign was lying flat between the rails with a fresh chip out of it. His lantern was found at the sign and brush marks continued eastward to the point where the body was found, indicating the body had been dragged eastward from the point of the sign about a car length or the distance of the last gap to be closed by the cars following the crash of the two cars that ran in after the coupler broke."

This statement of facts should be supplemented in two respects. There were six cars, not three, which had not coupled at the west end of track 5 (Tr. 37); the westernmost three cars were coupled together, then there was a space of about a car length, then the fourth car, then a little gap, then the fifth and sixth cars and another little gap between the sixth car and the train. (Tr. 37, 78) And after Jack O'Donnell walked along the cars standing on track 5, the crew made a move in the terminal yard, set the single ash or dump car in on the lead to track 5, and then coupled up track 1 from the west before pulling the cars on track 5 out of the yard and around to the east. (Tr. 93-85)

Upon these facts the respondent's contentions are:

(1.) There was sufficient evidence of probative value from which a jury could properly conclude that plaintiff's decedent was not struck in the course of the movement in which the coupler broke as contended by the plaintiff, but rather that he was killed in the final movement out of the yards as contended by the defendant;

(2.) That the question whether the coupler complied with the provisions of the Safety Appliance Act was properly left to the jury under proper instructions by the court.

## SUMMARY OF THE ARGUMENT

### I

**The Evidence Sustains the Defendant's Theory of the Accident—That the Decedent Was Killed in the Final Movement Out of the Yards.**

1. See opening statement of plaintiff's counsel (Tr. 21), the opening statement of defendant's counsel (Tr. 25) and the closing argument of defendant's counsel (Tr. 157, 160-169.)

2. It was the function of the jury to determine from the circumstantial evidence whether the decedent was killed on the first movement (as contended by the plaintiff) or on the final movement out of the yard (as contended by the defendant).

*Wilkerson* v. *McCarthy,* No. 53, October, 1948, Term, 69 S. Ct. 413;
*Tennant* v. *Peoria & P. U. Ry. Co.,* 321 U. S. 29, 35;
*Lavendar* v. *Kurn,* 327 U. S. 645;
*Lilly* v. *Grand Trunk R. Co.,* 317 U. S. 481, 491.

### II

**The Ruling Below—That the Fact that a Coupler Breaks While in Use is Evidence From Which a Jury May, But is Not Required to Infer a Violation of the Coupler Statute—is Sustained Both Upon Principle and Authority.**

*Minneapolis etc. R. Co.* v. *Gotschall,* 244 U. S. 66;
*New Orleans etc. R. Co.* v. *Scarlet,* 249 U. S. 528.

1. Since these authoritative decisions, both state and federal courts have uniformly held that the breaking of

a coupler does not demand a finding that the couplers were defective but "at most presented a question for the jury."

*Western & Atlantic R. R.* v. *Gentle,* 58 Ga. App. 252, 198 S. E. 257, certiorari denied, 305 U. S. 654;

*Vigor* v. *Chesapeake & O. Ry. Co.,* 7 Cir., 101 F. 2d 865, 869, certiorari denied, 307 U. S. 635;

*Cochran* v. *Pittsburgh & L. E. R. Co.,* D. C. Ohio, 31 F. 2d 769, 771;

Roberts, Federal Liabilities of Carriers (2d Ed., 1929), §620, p. 1211.

2. In the cases cited by petitioner as being in "conflict" with these decisions, the issue was one of proximate cause, not of negligence

(see:

*Reetz* v. *Chicago & E. R. Co.,* 6 Cir., 42 F. 2d 50;

*Erie R. Co.* v. *Caldwell,* 6 Cir., 264 Fed. 947

*Keenan* v. *Director General,* 2 Cir., 285 Fed. 286)

or the issue whether the coupler was defective was submitted to the jury

(see:

*Kowalski* v. *Chicago & N. W. Ry. Co.,* 159 Minn. 388, 199 N.W. 178 at 179;

*Southern Pacific Co.* v. *Thomas,* 21 Ariz. 355, 188 Pac. 268 at 269;

*McAllister* v. *St. Louis etc. Ry. Co.,* 324 Mo. 1005, 25 S.W. 2d 791 at 796;

*Philadelphia & R. Ry. Co.* v. *Eisenhart,* 3 Cir., 280 Fed. 271 at 272, 275.

3. To instruct the jury that a single failure to function is conclusive evidence of a violation of the statute is error; the choice between conflicting inferences is for the jury, and a peremptory instruction should not be given.

*Wilkerson* v. *McCarthy*, 69 S. Ct. 413.

## III

**There is No Error in the Court's Charge to the Jury.**

1. Objection to the instructions must be specific, and made before the jury retires.

> "No party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider the verdict, stating distinctly the matter to which he objects and the grounds of his objection."
>
> Rule 51, Rules of Civil Procedure.
>
> "In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial."
>
> *Palmer* v. *Hoffman*, 318 U.S. 109, 119.

2. The court properly instructed the jury on the provisions of the coupler state, and left to the jury the question of fact whether the coupler which broke violated the statute.

See cases cited under Point II.

3. The instructions did not confuse negligence with the charge of violation of the Safety Appliance Act.

See Argument.

4. The court properly instructed the jury they could not presume from the fact of the accident that the decedent was killed because of the broken coupler.

*Brady* v. *Southern Ry. Co.*, 320 U.S. 476, 484;
*Tennant* v. *Peoria & P. U. Co.*, 321 U. S. 29.

a. The challenged portion of the charge must be considered in connection with the charge as a whole.

*S. S. Kresge Co.* v. *McCallion*, 8 Cir., 58 F. 2d 931, 934.

b. The objection to the charge did not differentiate between the allegations based on common law negligence and the alleged statutory violations.

*Palmer* v. *Hoffman*, 318 U. S. 109, 119.

## ARGUMENT

### I

**The Evidence Sustains the Defendant's Theory of the Accident—That the Decedent Was Killed in the Final Movement Out of the Yards.**

The contentions argued in the petition for writ of certiorari—whether the breaking of a coupler is "negligence *per se*" or *conclusive* evidence of a violation of the Safety Appliance Act, and whether the jury was fully instructed on every facet of this issue—were not the issues upon which this case was tried and argued to the jury.

From the time the decedent was last seen by his brother, the foreman of the crew, until his body was found, more than an hour later, by the same brother, there had been only two movements along the track where his body was later found. The issue upon which this case was tried was whether the fatal accident occurred in the *first* of these movements, in which the coupler broke, and as to which plaintiff charged both negligence and a violation of the Safety Appliance Act, or in the *second* movement, as to which no negligence of any kind was charged. The directly opposite contentions of the parties were clearly stated in the opening statements to the jury. Plaintiff's counsel said:

> "So, it is our contention that the conclusion is inevitable that the time he was run over and killed, as shown by the physical facts and circumstances, was when the coupler broke loose while he was engaged in the course of his duties between the cars, and that the defective coupler was the proximate contributing cause of this accident" (Tr. 21).

Defendant's counsel stated:

> "Our contention, on the other hand, is that the man was killed during one of the other two movements on Track No. 5—either the movement when the single car went in there, or the movement a little while later when they pulled all the cars standing on Track 5 out of there, and the question for you to decide on the question of liability is which of the movements this accident occurred on" (Tr. 25).

The testimony of Jack O'Donnell, the decedent's brother, showed that the single car referred to had not come in contact with any of the cars on this track (Tr. 44), and defendant's counsel, in his argument to the jury said:

> "What are the facts of this accident? I told you in my opening statement that it was our contention that this injury to Mr. O'Donnell occurred not when these two cars broke off and ran onto Track 5, but on one of the two subsequent movements which were made in that direction, one, when at the close of their night work they set a single car in on that track, or the other, that the fatal accident occurred at the time that all of these cars were pulled eastwardly out of Track 5 and taken around in the general train yard.
>
> "The only man who knows about this accident is Jack O'Donnell, and Jack says the one ash car or dump car that was put in on that track did not come in contact with the cars that were there. I will take his word for it, and we will turn then to the question in this case which I think is controlling, and that is this:
>
> "Was Bill O'Donnell struck and run over at the time the coupler broke and those cars ran in on that track, or was he killed and run over when he was attempting to ride out on that cut of cars as they were being pulled to the east and around the roundhouse to be taken down in the general train yard, which, as

Jack O'Donnell testifies, it was often Bill O'Donnell's habit to do? That is the question in this case, ladies and gentlemen" (Tr. 157).

Defendant's counsel then said this to the jury:

"I [have] know[n] Jack a long time. I don't think that he would sit here on the witness stand and lie about the circumstances. I think, as I say, that he will give his sister-in-law the benefit of every possible inference that can be drawn in her favor. But I will take his testimony and I will assume that it is true. And I say to you, ladies and gentlemen, that taking his testimony and giving it every benefit that you can that would help his sister-in-law's case, I say to you that his testimony shows not only that it was less likely that his brother's death occurred in the course of this first movement. I say too that his testimony proves almost beyond the shadow of a doubt that the time when Bill O'Donnell was run over was as they were pulling the cars out of Track 5 to the east.

That is the question, ladies and gentlemen, and I invite Mr. Ryan in his closing argument to tell you why it is more likely that the accident occurred in the first movement, rather than in the last movement. It is not a question as to whether or not the coupler broke or not. There isn't any dispute about that" (Tr. 160-161).

Defendant's counsel then referred to five circumstances in the evidence which, in his judgment, supported defendant's contention that the fatal accident occurred in the final movement out of Track 5, as to which no negligence was charged. Because it is "the very essence of its [the jury's] function to select from among conflicting inferences and conclusions that which it considers most reasonable" (*Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, 35), we will only state briefly the five circumstances

relied upon by the defendant, with appropriate footnote references to the testimony which supported the arguments of defendant's counsel, and our answers to the replies which plaintiff's counsel now urges, but which he failed to argue to the jury:

1. The presumption that the decedent, knowing the next move was to be made into this track, would not knowingly put himself in a position of danger between the cars.[1]

2. The fact that all the open couplers of the cars at the west end of the track coupled up following the impact, indicated that at the time of the impact, the deceased had reached a point about 200 feet east of the place at which plaintiff contends he was standing.[2]

---

[1] The decedent had been continuously in the employ of the defendant 23 or 24 years and had worked on this particular job about two years (Tr. 63). Jack O'Donnell, his foreman, told decedent, just before he went down to track 5 (where the accident occurred) that he had one car for track 5, the balance to go to track 1 and the set-backs on track 2 (Tr. 36, 79). The presumption that the deceased exercised due care for his safety having this knowledge, was a proper circumstance for the jury's consideration. **Tennant v. Peoria & P. U. Ry. Co.**, 321 U. S. 29, 34. See defendant's argument on this point at Tr. 161-162. The statement in the jury argument of defendant's counsel, stressed by petitioner in her reply brief, p. 3, note 1, refers to the later movement of the single ash or dump car (Tr. 44), not to the movement of cars upon which the coupler broke. See the argument referred to, as fully set forth at page 11 of this brief.

[2] Starting from the west end of track 5, there were three cars coupled together, then a space of about a car length, between the third and fourth cars, then a little gap, then the fifth and sixth cars, then a gap between them and the remainder of the train (Tr. 37, 78). These cars had failed to couple upon earlier movements into track 5, and presumably the drawbars were out of alignment or the knuckles were closed (Tr. 37, 70). It was this situation which the decedent went to track 5 to correct (Tr. 38). Starting from the west end of the track, as he did, the first coupler which he

3. Although Jack O'Donnell knew the exact sequence and timing of the movements made, there was nothing about the breaking of the coupler which suggested to him that any harm might have resulted to his brother from the movement in which the coupler broke.[3]

4. Jack O'Donnell did not see any body or any indication of an accident when sometime after this first movement, he walked down along the north side of the cars

---

[2] (Continued)
would adjust was on the east end of the third car from the west, where plaintiff contends he was standing when the impact occurred. The fact that all the couplers "made" on that impact tended to show that he had completed the adjustment of the couplers on the fourth, fifth and sixth, and possibly the seventh car, which would place him at least 200 feet farther east. No reason is suggested in the record why, if he had completed the adjustment of the most easterly open coupler he would go back to the most westerly opening where, presumably, he had already made the adjustment. See defendant's argument at Tr. 162. The calculations made by petitioner's counsel in her reply brief, p. 10, note 2, omit the fifth and sixth cars, which also had not coupled (Tr. 35), so that the easternmost coupling to be aligned was more than two more car lengths or a total of about 200 feet, as we said. In any event, even petitioner's calculations place her decedent at the end of his duties nearly 100 feet east of where she claims he was struck.

[3] Jack O'Donnell's testimony on cross examination, was:

"Q. You knew your brother was somewhere down in that vicinity or at least he had gone down track 5 at the time you were moving this cut of cars out of track No. 2?

A. Yes.

Q. But there was nothing about that incident as it happened there that aroused any suspicion in your mind that anything might have happened to him in the course of the movement which had just been made at that time?

A. That is true" (Tr. 90).

Defendant's argument on this phase of the case is set forth at Tr. 163.

Petitioner in her reply brief suggests no other inference to be drawn from this testimony of her principal witness.

on track 5, flashing his lantern in between the cars to see if all the couplings had made. He walked "right alongside the track" for a distance of ten car lengths, right past the spot where his brother's body was later found and where, if he had been struck by the first movement, his body must have been lying along the north rail in the space between two of the cars where Jack flashed his lantern.[4]

5. When Jack O'Donnell found that his brother was not at the switchmen's shanty at the close of the night's work, the *first* place he looked for him was on the cars pulling out of the yard in the final movement (in which defendant contends the fatal accident occurred) the *next* place he looked was along track 1, where the crew had made a number of movements for which it was decedent's duty to line the couplers, and the *last* place he looked was at the west end of track 5.[5]

---

[4] See the testimony of Jack O'Donnell at Tr. 47, 48, 92, 93. If, as plaintiff claims, the decedent was struck as he attempted to adjust the coupler on the east end of the third car, then since the impact moved the cars about a car length (Tr. 89) and the drag marks along the track show his body was dragged 45 feet (Tr. 54, 125), which was the average length of the cars they were handling that night (Tr. 31), his body would have been right at the opening between the two cars and, we submit, Jack O'Donnell could not possibly have failed to see the body or the drag marks outside the north rail if the accident had occurred on the prior movement. Defendant's argument in which we referred to this evidence as "the most important fact in this case in determining whether the circumstantial evidence supports the plaintiff's theory" is set forth at Tr. 163-166. Whether, as petitioner argues in her reply brief, decedent's body would have been underneath the overhang of the car, and, if so, his brother would or would not have seen it, was clearly for the jury to decide.

[5] The decedent often rode out to the switchmen's shanty on this final movement of the repaired cars out of the repair yard (Tr. 96). Jack O'Donnell first went to the east end of

In conclusion defendant's counsel asked the jury to line up the undisputed circumstances "and determine from those circumstances in which of these two movements did this accident occur," pointing out that if it were equally likely or more likely that it occurred on the final movement, it was their "duty as jurors to return a verdict of not guilty" (Tr. 170, 171).

The circumstances now argued in petitioner's reply brief might have properly been argued to the jury in response to defendant's challenge to plaintiff's counsel "in his closing argument to tell you why it is more likely that the accident occurred in the first movement rather than

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[5] (Continued)

the yard and waited until the entire cut had moved out (Tr. 50, 96, 97); then he looked along the east end of Track 1 because he "thought maybe he had been walking up No. 1" (Tr. 50, 97); then he checked again at the shanty and with the engineer who had then returned (Tr. 50, 97); then he looked again along track 1, and finally along the west end of track 5 (Tr. 51, 97).

The crew had made a number of movements into track 1 after the coupler broke and the next to the last movement had been to shove the cars on track 1 to couple them all up (Tr. 65, 94, 95). The decedent knew these moves were to be made and part of his duties was to line the couplers for these movements (Tr. 36, 70). After all these movements had been made, he often rode out on the final movemnt (Tr. 96).

Defendant's argument that this evidence showed the probability that decedent was killed as he attempted to ride out of the yard on the final movement and also supported the inference that after he had completed his work on track 5, he had gone to track 1 to line the couplers there, thus accounting for the interval of time and the fact that Jack O'Donnell had not seen him along track 5, is set forth at Tr. 166-169.

Whether the foot-marks and the chip mark in the safety sign were made by the decedent at the time he was struck, or by someone else, or by him at an earlier time, and the significance to be attached to these facts, was well as the argument now made as to the manner of his falling, were also for the jury.

in the last movement" (Tr. 161). But even if he had, the jury was "free to discard or disbelieve whatever facts are inconsistent with its conclusion." *Lavendar* v. *Kurn*, 327 U. S. 645, 653. The single circumstance that when Jack O'Donnell walked down along track 5, in the interval between the two movements, he did not see his brother's body at the place where it was later found, justifies the inference that his brother was then alive and uninjured, just as would testimony that he actually saw him alive and well. The failure of petitioner's counsel to explain away this fact was the turning point of this case on the real issue upon which this case was tried and argued to the jury. This issue, to which defendant's counsel directed nearly his entire argument to the jury, was not 'only camouflage" as petitioner now argues; it was the basic issue from the opening statements to the closing arguments.

With two conflicting versions of how the accident happened before them, each sustained by inferences to be drawn from the evidence, the choice between them was for the jury. Neither party was entitled to have the court decide, as a matter of law, that either version was untenable. The Court of Appeals rightly said of this issue (171 F. 2d 973, 975; Tr. 246):

> "'Thus it is clear that the question was one of fact. The jury is the tribunal to decide that type of issue, *Bailey* v. *Central Vermont Ry.*, 319 U. S. 350, 353; 63 S. Ct. 1062; 87 L. Ed. 1444, and while the jury was entitled to draw inferences from the evidence, nevertheless, plaintiff was required to present probative facts from which the negligence and causal relation could reasonably be inferred. *Tennant* v. *Peoria & P. U. Ry.*, 321 U. S. 29, 32; 64 S. Ct. 409; 88 L. Ed. 520. The choice of conflicting versions of the way the accident happened and the inferences to be drawn

from uncontroverted as well as controverted facts, are questions for the jury. *Ellis* v. *Union Pacific R. R.*, 329 U. S. 649, 653; 67 S. Ct. 598; 91 L. Ed. 572.

"In this case we cannot say that the evidence leads only to a conclusion other than that reached by the jury or that the jury reached a verdict that has no basis in the evidence. We are not warranted in setting aside a verdict where there are two versions in the evidence or where the evidence is so uncertain that no definite conclusion can be reached therefrom. To resolve such factual situations is clearly the province of the jury. *Lavendar* v. *Kurn*, 327 U. S. 645; 66 S. Ct. 740; 90 L. Ed. 916, and *United States* v. *Douglas Aircraft Co.*, 9 Cir., 169 F. 2d 755.

## II

**The Ruling Below—That the Fact that a Coupler Breaks While in Use is Evidence From Which a Jury May, But is Not Required to Infer a Violation of the Coupler Statute—is Sustained Both Upon Principle and Authority.**

The principal question argued in the petition for writ of certiorari is petitioner's contention that the breaking of a coupler "in normal use" is conclusive evidence of a violation of the Safety Appliance Act (45 U. S. C. A. §2). We may note at the outset that no such question is presented by this record; the evidence shows that this particular stop, when the coupler broke, was a "violent stop" in response to "a very violent stop sign" or washout signal, when because of impaired visibility, earlier slow or stop signals had not been seen or obeyed (Tr. 41, 42, 83, 84). None of plaintiff's tendered instructions (Tr. 259-264), the objections to the instructions given (Tr. 194), the motion for new trial (Tr. 216-219, 221), or the statement of points relied upon (Tr. 224-230) qualified the fact of breaking by the phrase "in normal use" or any equivalent language. But passing that question and coming to

the merits of plaintiff's contention, we think that the language of the statute itself, and the decisions of this Court have settled for more than thirty years the rule that the fact that a coupler breaks while in use is evidence from which a jury *may infer* that the coupler did not comply with the statute, but is not *conclusive* evidence of such a violation.

Unlike other provisions of the Safety Appliance Act, which require the carrier to use "safe" or "efficient" or "secure" devices and appliances (45 U. S. C. A. 3, 4, 11, 23), the coupler provision of the Safety Appliance Act imposes a specific functional test: that the couplers shall "couple automatically by impact" and "can be uncoupled without the necessity of men going between the ends of the cars" (45 U. S. C. A. §2). The evils against which the statute was directed were those which attended the old-fashioned link and pin couplings and the purpose of the statute was to enable employees to couple and uncouple cars without going between the ends of the cars. *St. Louis and S. F. R. Co.* v. *Conarty,* 238 U. S. 243, 250. The *only* absolute duty imposed on the carrier is that the coupler shall comply with this specific functional test; there is no absolute duty that the coupler shall not break while in use, whether in normal use or in a very violent stop.

More than thirty years ago, in *Minneapolis, etc. R. Co.* v. *Gotschall,* 244 U. S. 66, in a unanimous opinion by Mr. Chief Justice White, this Court held that

> "• • • in view of the Safety Appliance Act, negligence *might be inferred* from the mere opening of the couplers." (Emphasis supplied.)

Two years later in *New Orleans, etc. R. Co.* v. *Scarlet,* 249 U. S. 528, this Court, in an opinion by Mr. Justice Bran-

deis, decided the precise question which plaintiff seeks to argue again here. In the *Scarlet* case, the accident was caused by the breaking of the king pin of the coupler and the coupling chains between the engine and the tender (249 U. S. at 529). In the trial court plaintiff had relied upon the state "*prima facie* act" as dispensing with proof of negligence; on appeal it was conceded that this error, as held in *New Orleans etc. R. Co.* v. *Harris,* 247 U. S. 367, and the judgment in plaintiff's favor must be reversed unless the error was harmless, as plaintiff contended, because "the mere breaking of the king pin and coupling chains shows conclusively that they were defective" and therefore violated the absolute duty imposed by the Boiler Inspection Act (45 U. S. C. A. §23), one of the Safety Appliance Acts. This is precisely the contention advanced by the plaintiff here. This Court held (p. 530):

> "* * * it is clear that the evidence did not establish as a matter of law that the king-pin or the chains were defective. At most it presented a question for the jury. Compare *Minneapolis & St. Louis R. R. Co.* v. *Gotschall,* 244 U. S. 66."

Following these decisions, the courts have uniformly held that the breaking of a coupler "does not demand a finding that the couplers were defective," but "at most presented a question for the jury." *Western & Atlantic R. R.* v. *Gentle,* 58 Ga. App. 252, 198 S. E. 257, certiorari denied, 305 U. S. 654; *Vigor* v. *Chesapeake & O. Ry. Co.* (C. C. A. 7), 101 F. 2d 865, 869, certiorari denied, 307 U. S. 635; *Cochran* v. *Pittsburgh & L. E. R. Co.* (D. C. Ohio), 31 F. 2d 769, 771; and see Roberts Federal Liabilities of Carriers (2nd Edition, 1929), §620, p. 1211. The Court of Appeals below correctly summarized this well-settled construction of the statute, saying (Tr. 247; 171 F. 2d 973 at 976):

"While the duty resting upon defendant to furnish couplers that complied with the Safety Appliance Act was absolute, and it has been held that the statute should be liberally construed 'so as to give a right of recovery for every injury the proximate cause of which was a failure to comply with a requirement of the Act', *Brady* v. *Terminal R. R. Association,* 303 U. S. 10, 15, 58 St. Ct. 426, 429, 82 L. Ed. 614, we do not believe the Act required defendant to furnish couplers that would not break. We think the true rule is that where a coupler does break, the jury may, if they think it reasonable under all the circumstances, infer that the coupler was defective and was furnished and used in violation of the Act. The cases go no further than to hold that from the breaking of a coupler the jury may infer negligence. *New Orleans & N. E. R. R.* v. *Scarlet,* 249 U. S. 528, 39 S. Ct. 369, 63 L. Ed. 752; *Minneapolis & St. Louis R. R.* v. *Gotschall,* 244 U. S. 66, 37 S. Ct. 598, 61 L. Ed. 995, and *Vigor* v. *Chesapeake & O. Ry.,* 7 Cir., 101 F. 2d 865. Permitting the jury to infer negligence from the breaking of the coupler with no other proof of negligence, as in the *Gotschall* case, is a different thing from telling the jury they must find negligence from the breaking of the coupler. It is the difference between leaving the question to the jury and peremptorily instructing the jury to find for plaintiff."

Petitioner urged that there is "great divergence of judicial opinion" on this question and urged that the writ be granted to resolve this supposed conflict (Petition, p. 14). But upon examination, the supposed "conflict" disappears. While in some cases the courts have spoken in general terms of the carrier's duty to furnish "safe couplers" and "couplers which will remain coupled," *no case holds that the breaking of a coupler is as a matter of law a violation of the absolute duty imposed by the Safety Appliance Act.* In some of the cases cited by the plaintiff, the contention of the defendant was that upon the

facts of the case, as a matter of law, the breaking of the coupler was not the proximate cause of the accident; in those cases, except *Reetz* v. *Chicago & E. R. Co.*, 6 Cir., 42 F. 2d 50, the court held that the question was for the jury, and the verdict having been for the plaintiff, it would not be disturbed. See *Erie R. Co.* v. *Caldwell*, 6 Cir., 264 Fed. 947; *Keenan* v. *Director General*, 2 Cir., 285 Fed. 286. In several of the cases cited by the plaintiff as holding to the contrary, it clearly appears that the court also *submitted to the jury* the question whether the couplers violated the Safety Appliance Act, and what the court held was that the fact that the couplers broke was sufficient as a matter of law to support the jury's finding that the couplers were defective, not that the jury should have been peremptorily instructed so to find as a matter of law. See, for example, *Kowalski* v. *Chicago & N. W. Ry. Co.*, 159 Minn. 388, 199 N. W. 178;[6] *Southern Pacific Co.* v. *Thomas*, 21 Ariz. 355, 188 Pac. 268;[7] *McAllister* v. *St. Louis etc. Ry. Co.*, 324 Mo. 1005, 25 S. W. 2d 791;[8] *Philadelphia & R. Ry. Co.* v. *Eisenhart*, 3 Cir., 280 Fed. 271.[9] The fact that in these cases the jury de-

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[6] "The court submitted the case to the jury on the theory that a showing had been made which would support a finding of a violation of the Federal Safety Appliance Act." 199 N. W. at 179.

[7] "This evidence * * * is sufficient to justify the jury in finding as facts the answers to the three interrogatories, viz.: that the couplers were defective * * *." 188 Pac. at 269.

[8] "The issue of negligence submitted and upon which the jury was instructed was whether or not 'the coupler of one of the cases mentioned in the evidence was defective and broke' * * *." 25 S. W. at 796.

[9] "For evidence of negligence in support of the counts under the Safety Appliance Act, the plaintiff relied upon the inference of a defective coupler, drawn from the fact that the couplers uncoupled * * * the case was properly submitted and the verdict should be sustained on the inference of defendant's negligence to be drawn from the mere opening of the couplers." 280 Fed. at 272, 275.

cided the issue for the plaintiff does not mean that the issue must always be withheld from the jury and decided by the court.

The lower court decisions, upon which petitioner relies to create a supposed "conflict," are, as Mr. Roberts pointed out twenty years ago, merely "a conspicuous illustration of the dangers incident to so sweeping a generalization"; the "true rule to be deduced from the cases" is that "proof that the cars became uncoupled while in use, without human intervention, either because the coupler or some part thereof broke, or for some unexplained reason, is evidence from which a jury is *entitled to infer* that the coupler was not in condition to perform the function required of it by the statute, and hence that the Act was violated" (emphasis supplied). Roberts, Federal Liabilities *of Carriers* (2nd ed., 1929), Sec. 620; *Vigor* v. *Chesapeake & O. Ry. Co.*, 7 Cir., 101 F. 2d 865. Even evidence that upon a particular movement, a coupler failed to couple automatically by impact, or to uncouple at the first attempt is merely evidence from which a jury may properly find that the statute was violated. *Penn* v. *Chicago & N. W. Ry. Co.*, 335 U. S. 849, reversing 163 F. 2d 995; compare *Myers* v. *Reading Co.*, 331 U. S. 477. The fact that the coupler broke is no more conclusive evidence than this. But no case holds that it is proper to instruct the jury in effect that a single failure to couple automatically upon impact conclusively established defendant's violation of the statute.

This Court recently reaffirmed its sixty-year-old stand that

> "'* * * so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such

> questions as these as well as others.' *Jones* v. *East Tennessee R. Co.*, 128 U. S. 443, 445. And peremptory instructions should not be given in negligence cases 'where the facts are in dispute, and the evidence is that from which fair-minded men may draw different inferences.' *Washington & G. R. Co.* v. *McDade*, 135 U. S. 554, 572. Such has ever since been the established rule for trial and appellate courts. See *Tiller* v. *Atlantic C. L. R. Co.*, 318 U. S. 67, 68."

That principle, announced in *Wilkerson* v. *McCarthy*, 69 S. Ct. 413, is applicable here. Petitioner contends that she should have been granted a peremptory instruction in her favor on this issue. But it was for the jury, under the long line of decisions of this Court, to determine from the fact of breakage, whether the coupler complied with the letter of the statute. The *Scarlet* and *Gotschall* cases have long since made clear the applicable rule of law: it is for the jury to determine, from the fact of breakage as well as from the other facts and circumstances, such as here the important fact that the coupler broke in a "violent stop" (Tr. 42) whether the coupler was furnished and used in violation of the specific command of the statute. The duty to comply with the statute is, of course, absolute and mandatory; but the question whether the statute has in fact been violated is for the jury. If, as this Court and the lower courts have so frequently held, the jury *may* infer a violation from certain facts, it follows necessarily that they may also *refuse* to draw that inference. All that petitioner can contend here is that the jury might have, but failed to draw the inference for which she contended. So long as juries are the triers of fact, that must always happen to one of the parties to the lawsuit.

Plaintiff urges in her reply brief that the contention now made by the defendant "is contrary to the theory upon which it tried its case." Reply brief, p. 11. Defend-

ant did plead that the Safety Appliance Act was not applicable to movements wholly within a repair yard, as these movements were (Tr. 14), but did not urge the point below. And defendant's counsel did save his right, by appropriate objections, to rely upon his alternative point based upon *Woods* v. *Chicago, B. & Q. R. Co.*, 306 Ill. 217, 137 N. E. 806, that the breaking of a coupler did not tend to prove a violation of the coupler statute. But the fact that the statements of defendant's counsel were made *by way of objection to the trial court's ruling* establishes conclusively that the case was submitted to the jury upon the theory that from the breaking of the coupler, the jury might infer, or find, that the statute had been violated. If the defendant did not win its verdict on the theory that the decedent was killed on the final movement out of the yard, then it won because the jury refused to draw the inference that the statute had been violated. Historically that was and is the privilege of the jury; its right to exercise that function cannot be denied as a matter of law.

## III

**There is No Error in the Court's Charge to the Jury.**

**1. Objection to instructions must be specific, and made before the jury retires.**

Rule 51 of the Rules of Civil Procedure provides:

> "* * * No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider the verdict, stating distinctly the matter to which he objects and the grounds of his objection."

Mr. Ryan's entire objection to the court's charge to the jury was as follows:

> "We object to the failure to state that the jury may regard the violation of the Safety Appliance Act as

negligence in and of itself and which is in itself sufficient to require them to find a verdict in favor of the plaintiff.

"One more thing:

"I object specifically to the instruction that if the jury believe it were a mere accident, that no recovery could be had because of the fact that the undisputed evidence shows that the coupler broke, and that if there were a violation of the Safety Appliance Act the mere accident instruction is inapplicable. It entices the jury to find by reaching a conclusion contrary to law.

"I have one objection to make on the ground that if they find there was a violation of the Safety Appliance Act they must further find it was the proximate cause of the accident on the ground that if it were the proximate contributing cause of the accident the jury would be required to find a verdict for the plaintiff" (Tr. 194).

In *Palmer* v. *Hoffman,* 318 U. S. 109, this Court said (p. 119):

"* * * a general exception is not sufficient. In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial. See *Lincoln* v. *Claflin,* 7 Wall, 132, 139; *Beaver* v. *Taylor,* 93 U. S. 46, 54-55; *Mobile & Montgomery Ry. Co.* v. *Jurey,* 111 U. S. 584, 596; *McDermott* v. *Severe,* 202 U. S. 600, 611; *Norfolk & W. Ry. Co.* v. *Earnest,* 229 U. S. 114, 122; *Pennsylvania R. Co.* v. *Minds,* 250 U. S. 368, 375.

"That long standing rule of federal practice is as applicable in this type of case as in others."

While not under the Federal Employers' Liability Act, the *Palmer* case was a negligence action for personal injuries, and is controlled by the same principles of trial and appellate court practice which govern this action. Within those well-settled principles, there was no error in the instructions here.

**2. The court committed no error in the instructions on the coupler statute.**

Petitioner's objection in the court below to the failure to instruct that "the violation of the Safety Appliance Act was negligence in and of itself and * * * sufficient to require them to find a verdict in favor of the plaintiff" is predicated upon her erroneous theory that the breaking of a coupler was negligence *per se* and conclusively established a violation of the coupler provision of the Safety Appliance Act (45 U. S. C. A. §2). Her counsel tendered no instruction stating the correct rule that from the fact that the coupler broke the jury might infer that the coupler did not comply with the statute. Having in mind the plaintiffs requested instructions and following the practice suggested in *Levin* v. *Seagram & Sons,* 7 Cir., 158 F. 2d 55, defendant's counsel inquired, prior to the argument to the jury, how the court intended to instruct the jury with reference to plaintiff's contention "that a coupler which breaks in half as this one did, violates the coupler provision of the Safety Appliance Act," and the court stated:

> "I intend to instruct the jury on the law as to the Federal Safety Appliance Act, and let them decide whether under my instructions on the law, such a breakage is a violation thereof" (Tr. 144).

The court did so instruct the jury, saying (Tr. 186):

"Now in the last two charges of the plaintiff's complaint referred to there has been a lot of discussion about this Federal Safety Appliance Act insofar as it applies to this particular case. I will read it to you. It provides in Section 2 of Title 45 of the United States Code Annotated, as follows:

> " 'It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers or coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars.'

"That is the statute. Now, that statute places upon the railroad engaged in the type of business that this railroad was engaged in at the time of this occurrence an absolute duty to provide the couplers which I have just read to you from the statute, and to provide them in such order as the statute indicates."

and, a little later (Tr. 188):

"Now, if you believe from a preponderance of the evidence, and I will tell you what that means in a little while, under the instructions of the Court, that the defendant, at the time and place in question, used and operated a car with a defective coupler, contrary to the provisions of the Federal Safety Appliance Act, and that said coupler broke, and that as a direct and proximate result thereof, the plaintiff's decedent sustained injuries which resulted in his death, then you may find the defendant guilty. But as I said before, in the event you find that such violation of the Federal Appliance Act is the proximate cause of his death, then negligence or contributory negligence on the part of the decedent is entirely immaterial and does not affect his right to recover the amount of damages."

This latter portion of the charge is substantially as requested by plaintiff's proposed instruction No. 5 (Tr. 261) with the correct substitution of "may find" for the peremptory "should find." Under the cases we have cited, these portions of the charge properly submitted to the jury the question whether the coupler violated the test of the statute.

These instructions did not leave to the jury any legal question as to the construction of the statute. The court told the jury just what the statute provides; that the railroad was under "an absolute duty" to provide such couplers; and that if the defendant used and operated a car with a defective coupler, contrary to the statute, and the coupler broke, and as a direct and proximate result thereof, plaintiff's decedent came to his death, they might find the defendant guilty. While this charge does not embody plaintiff's mistaken notion as to the applicable rule of law, the charge does state the correct rule, and left to the jury's determination the two basic questions of fact: first, did the coupler comply with the statute, and second, did the broken coupler cause the man's death. The court would not have been justified in embellishing the statute by referring to "safe coupling devices" or generalizing about "defective couplers." The statutory test is simple and readily understandable; no further explanation than the words of the statute was necessary, nor, for that matter, was any such elaboration ever requested by the plaintiff in the trial court.

In his dissenting opinion in the court of appeals, Judge Minton predicated error on the failure of the trial court to instruct the jury that it might infer negligence from the breaking of the coupler. Judge Minton recognizing that plaintiff did not object to this failure to instruct as required by Rule 51 and the well-settled federal appellate

practice (Tr. 250; 171 F. 2d at 978). But in plaintiff's petition for rehearing in the Court of Appeals, her counsel insisted "it was not our theory in the trial court, nor is it in this court, that the breaking of a coupler is merely ground for an inference of a violation of the Act." Petitioner has not only waived in the trial court any right to rely upon the proposition advanced by Judge Minton, but she expressly repudiated it in the Court of Appeals.

Finally, petitioner argues that defendant's counsel misstated the law as to the carrier's duty with reference to couplers in his argument to the jury. Inasmuch as plaintiff's counsel had argued that the statutes "make the railroad company absolutely liable in this case if a coupler broke" (Tr. 146), we think the argument of defendant's counsel properly directed the jury's attention to the language of the statute as the court had stated he intended to, and later did charge the jury. The court's ruling:

> "The jury will be governed by what the court instructs them as to the law and not what counsel says * * * you will take your instruction as to the law from the court" (Tr. 146)

removed any possibility of prejudicial error from any misstatement of either counsel as to the law. The court also pointed out to plaintiff's counsel that "you will have a chance to protest when you answer him" (Tr. 159). When his chance came, he dismissed it summarily with "I don't have to waste time discussing it" (Tr. 177).

We respectfully submit that the trial court correctly instructed the jury, as he had indicated in advance he would, as to the language of the statute and the "absolute duty" imposed thereby. If plaintiff's counsel desired any elaboration of the instruction, telling the jury that while the breaking of the coupler was not conclusive evidence of negligence, it was nonetheless some evidence from which

they might infer negligence, it was his duty, under the rules, specifically to call this to the attention of the trial judge and to request such an instruction. The trial court's ruling to which defendant's counsel was objecting (*supra*, p. 25) show very clearly that the court would have so instructed the jury if such a request had been made. In the absence of any such request, it is too late for counsel in his reply brief in this Court to suggest for the first time that there was error in the trial court's failure to instruct that the jury "had the right to infer negligence" from the breaking of the coupler.

**3. The instructions did not confuse negligence with the charges of violation of the Safety Appliance Act.**

The complaint originally charged five "negligent acts" (Tr. 5), two of which, (d) and (e), were withdrawn by the plaintiff at the close of the case (Tr. 139) and one of which, (c), was amended (Tr. 13). The charges which went to the jury were that the defendant:

> "(a) Carelessly and negligently propelled and impacted two or more of the said cut of cars upon and against the cars projecting out on the west rip lead at the place aforesaid.
>
> "(b) Carelessly and negligently failed to equip and maintain on the cars standing on No. 5 rip track, couplers which would couple automatically by impact without the necessity of men going between the ends of cars, contrary to the provisions of the Safety Appliance Act.
>
> "(c) Carelessly and negligently failed to equip and maintain on one of the cars being moved along the said track, a safe and efficient coupler which would remain coupled to the car to which it was attached, but which, on the contrary, was so defective and insecure that it broke loose from said car, contrary to the provisions of the Federal Safety Appliance Act."

Plaintiff's tendered instruction No. 1 repeated these charges, omitting only the word "carelessly" (Tr. 260). Thus the plaintiff herself posed her case on charges that the defendant "negligently" violated the Safety Appliance Act, in addition to ordinary negligence in the movement of the cars.

The trial judge, however, carefully drew the distinction between the two charges in his instructions. In summarizing the allegations of the complaint, he pointed out that the second and third "acts of negligence which she charges" were the failure to equip and maintain the described couplers (Tr. 183); he pointed out that these allegations "charge specific acts in violation of the Federal Safety Appliance Act" (Tr. 183); that the defendant was under "an absolute duty to provide the couplers • • • in such order as the statute indicates" (Tr. 186); that the first determination to be made by the jury was "whether or not the defendant is guilty of one or more or all of these acts of negligence" (Tr. 187); that contributory negligence must be considered on the first charge but that as to the charges of violation of the Safety Appliance Act, "contributory negligence does not enter into it at all" and "has no bearing whatever in this matter" (Tr. 187); and, finally, that if they believed that the defendant "used and operated a car with a defective coupler, contrary to the provisions of the Safety Appliance Act, and that said coupler broke", which caused the death of plaintiff's decedent, "then negligence or contributory negligence • • • is entirely immaterial and does not affect his right to recover" (Tr. 188). Notwithstanding the fact that under both the allegations of her complaint and her tendered instructions, plaintiff would have been required to prove that the defendant "negligently" used a coupler which violated the statute, the trial judge, in his instructions to

the jury, carefully drew the distinction between the charge of ordinary negligence and the charges of violation of the coupler statute. He told the jury that the use of a coupler which violated the statute in itself was the act of negligence charged in the second and third specifications of negligence; that if the jury found the defendant used such a defective coupler and the coupler broke "negligence is entirely immaterial." Certainly these instructions told the jury that the use of a coupler which violated the statute was an act of negligence and in itself sufficient to impose liability upon the defendant if the broken coupler caused the man's death; to add that it was also "negligence *per se*" could not have aided a jury of average American citizens unfamiliar with Latin phraseology.

Petitioner argues that the court's "charge as a whole" would lead the jury to understand that "plaintiff had to prove negligence" and that "this requisite was not confined, as it should have been, to the first charge of negligence, but applied as well to the charges of violation of the Safety Appliance Act." But no such objection to the "whole charge" was taken in the trial court, and "where part of the charge was correct he may not through a general exception obtain a new trial." *Palmer* v. *Hoffman*, 318 U. S. 109, 119. We submit that the assertion that the "charge as a whole" presents no assignment of error other than that petitioner is dissatisfied with the outcome of the trial. The Court of Appeals, composed of experienced *nisi prius* judges, familiar with the problems of jury trials correctly concluded (Tr. 248; 171 F. 2d at 977):

> "Moreover, upon examination of all the instructions given, we find that the court correctly explained to the jury, the issues and the law applicable thereto. He told the jury that if they found the coupler did not comply with the requirements of the statute and that as a result O'Donnell had been killed in the movement

which followed, they could find defendant guilty. He distinctly and in express terms called attention to the three grounds of liability charged, and the statutes involved. He defined negligence, proximate cause, the preponderance of the evidence and instructed them as to the limited extent to which contributory negligence entered into the issues. Under these circumstances we do not believe that the instructions considered as a whole were erroneous."

**4. The court properly instructed the jury on the question of proximate cause.**

Petitioner also complains of that portion of the charge by which the jury was instructed that the mere happening of the accident by which the decedent lost his life does not in and of itself create a liability upon the defendant; that the fact of such an accident carries no presumption of negligence; that the evidence must point to the fact that the defendant was guilty of one of the three allegations of negligence in plaintiff's complaint; that they could not guess between the various causes of the accident and find that the negligence charged was the proximate cause of the accident if there was no satisfactory foundation for such a conclusion.

The only exception taken in the trial court which might refer to this portion of the charge was to "the instruction that if the jury believe it were a mere accident, that no recovery could be had * * * if there were a violation of the Safety Appliance Act the mere accident instruction is inapplicable." (Tr. 194). The jury were not instructed that if there were a mere accident, there could be no recovery; the jury were instructed that "the mere happening of an accident by which the plaintiff's decedent lost his life does not in and of itself create a liability upon the defendant to pay for it." (Tr. 187). This is precisely what the court held in *Brady* v. *Southern Ry. Co.* 320 U. S. 476, 484:

"Liability arises from negligence not from injury under this Act. And that negligence must be the cause of the injury".

The Court of Appeals properly realized that this instruction was directed to the question of proximate cause, saying (Tr. 248; 171 F. at 977):

"The criticized instruction is directed to the question of proximate cause. It correctly cautioned the jury that they could not presume from the fact of the accident that O'Donnell was killed because of the breaking of the coupler. *Brady* v. *Southern Ry. Co.*, 320 U. S. 476, 483."

The "accident" referred to in this instruction is not the breaking of the coupler, but is the running over of the decedent. The real issue in this case was whether the accident in which O'Donnell was killed occurred on the first movement, as to which negligence was charged, or on the final movement out of the yard. The fact that he was accidentally killed did not give rise to any presumption that it was one movement rather than the other. Liability arises from negligence; not from the mere fact of injury. *Brady* v. *Southern Ry. Co.*, 320 U. S. 476, 434. Mere speculation cannot do duty for probative facts. *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29. The challenged instruction properly protected the defendant against a verdict based upon sympathy and guess-work. Petitioner's criticism wholly misunderstands the subject matter of this instruction.

Petitioner also complains because later in the charge, after charging what constituted negligence, what the charges of negligence were, and the definition of proximate cause, the court repeated that "as I have told you in the beginning, the fact of an accident carries with it no presumption of negligence on the part of the defendant"; that the plaintiff must prove one or more of the

three alleged grounds of negligence, not that the defendant was possibly guilty of the negligence charged; and if it was uncertain as to which movement caused the decedent's death, the jury had no right to guess between them and find that the negligence charged was the proximate cause of the accident "if there is no satisfactory foundation in the testimony for that conclusion" (Tr. 189).

The Court of Appeals correctly pointed out that "all the instructions must be considered together as one charge." (Tr. 248; 171 F. 2d at 977) As another court has recently put it:

> "It is not difficult to destroy almost any charge by isolating certain limited expressions therein, but the charge must be considered as a whole with a view of determining the impression conveyed thereby to the jury." *S. S. Kresge Co.* v. *McCallion,* 8 Cir., 58 F. 2d 931, 934.

Considering the charge in entirety, there can be no doubt that by the use of the word "accident" the court was referring to the running over of the decedent, not to the fact that a coupler broke, and that what the particular portion of the charge now being considered meant was that plaintiff had the burden of proving by the preponderance of the evidence, not by mere guesswork, that the decedent was run over because the defendant was guilty of one or more of the three charges of negligence, two of which were the asserted statutory violations. Nothing in this portion of the instruction, taken by itself, or considered in connection wth the charge as a whole, could be regarded as a direction to disregard the breaking of the coupler in determining the issues of negligence.

Judge Minton in his dissenting opinion recognized that if this instruction be deemed to refer to the breaking of

the coupler, it was appropriate where only common law negligence is considered, but not controlling upon the charge of a violation of the coupler statute. But even if the instruction is so construed, there still remains the failure of counsel to call the objection specifically to the court's attention. This is precisely the question upon which this Court passed in *Palmer* v. *Hoffman,* 318 U. S. 109. That, case like this, was an action for negligence, with charges of both statutory and common law negligence. This Court held (p. 119):

> "As we have noted, petitioners in their exceptions to the charge given and in the requested charge did not differentiate between the cause of action based on the Massachusetts statute and those on the common law. Even if we assume that the charge on the latter was erroneous, we cannot say that the charge was incorrect so far as the statutory causes of action were concerned. Likewise we must assume that it would have been error to give the requested charge on the statutory causes of action even though we accept it as the correct charge on the others. Under these facts a general exception is not sufficient. In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial. See *Lincoln* v. *Claflin,* 7 Wall. 132, 139; *Beaver* v. *Taylor,* 93 U. S. 46, 54-55; *Mobile & Montgomery Ry. Co.* v. *Jurey,* 111 U. S. 584, 596; *McDermott* v. *Severe,* 202 U. S. 600, 611, *Norfolk & W. Ry. Co.* v. *Earnest,* 229 U.S . 114, 122; *Pennsylvania R. Co.* v. *Minds,* 250 U. S. 368, 375.
>
> "That long standing rule of federal practice is as applicable in this type of case as in others. That rule cannot be avoided here by reason of the requested

charge. For, as we have said, it was at most only partially correct and was not sufficiently discriminating."

The obligation of this plaintiff to try her case, and to make her objections in accordance with the rules is same as that of the plaintiff in the *Palmer* case; she has no greater rights because she proceeds under the Federal Employers' Liability Act. Plaintiff's counsel has had a long experience in personal injury litigation (see *Ryan* v. *Pennsylvaina R. Co.*, 268 Ill. App. 364, 369); if from his experience, he did not deem the matter of sufficient importance to make specific objection at the time, and give the court an opportunity to correction any misapprehension which might be conveyed to the jury, wholly unintentionally, by this instruction, it was his duty under the rules to make objection then. After he has failed to persuade the jury, he cannot be permitted to comb through the record for some possibly-misunderstood charge in order to secure a new trial.

We respectfully submit this case was fairly tried upon a single clear-cut issue: did the accident happen when the plaintiff claims, on the first movement, or did it happen when the train was being pulled out of the yard, and decedent attempted, as he frequently did, to ride out on the cars to the switchman's shanty? The trial court fully instructed the jury on the charges upon which liability was claimed, on the statute and the absolute duty it placed on the carrier, on the meaning of negligence and proximate cause, on contributory negligence and its limited application, on the burden of proof and what constitutes the preponderance of the evidence. Only hypercritical and belatedly-interposed objection is taken to the court's charge; at the time of trial, with the evidence, the arguments of counsel and the court's instructions clearly in mind, plaintiff's counsel saw none of the criticisms which he now makes.

We believe the jury returned a verdict for the defendant because they believed the defendant's theory of how the accident happened. Both courts below, Judge Minton concurring, held the evidence sufficient to sustain the verdict. This Court should not deprive the defendant of its hard-won victory because of any objections to instructions which were first urged after verdict in this case.

## CONCLUSION

This is not a case in which plaintiff was "deprived of all benefit of the Safety Appliance Act." It is simply a case in which plaintiff's counsel failed to convince the jury that the decedent was killed in the movement in which she charged the Safety Appliance Act was violated.

We think plaintiff lost her case not because the jury were in any way confused about the absolute duty imposed by the coupler statute or the probative force to be given to the fact that a coupler broke, but because her counsel could not explain to the jury how, if William O'Donnell were struck by the first movement of cars, his brother Jack could walk "right alongside the track" past his brother's body and not see it. The jury found that he was not killed as the result of the broken coupler and not one of the errors charged here could have affected that verdict. And even if the jury concluded that the broken coupler was not a violation of the specific functional test of the statute, that was their prerogative. The plaintiff had a full and fair trial, the errors complained of did not affect its outcome and the verdict of the jury approved by both courts below should not be disturbed.

Respectfully submitted,

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KNAPP, CUSHING, HERSHBERGER
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1949.

No. 56 56

SARAH O'DONNELL, Administratrix of the Estate of WILLIAM O'DONNELL, Deceased,
*Petitioner,*

*vs.*

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,
*Respondent.*

## Petition for Rehearing

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1949.

**No. 56**

SARAH O'DONNELL, Administratrix of the Estate of WILLIAM O'DONNELL, Deceased,

*Petitioner,*

*vs.*

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,

*Respondent.*

## PETITION FOR REHEARING.

Notwithstanding the fact that for more than fifty years since its enactment there has been no change in the explicit language of the coupler provision of the Safety Appliance Act (27 Stat. 531):

> "Sec. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

although in every case which reached this court either for decision[1] or by petition for certiorari[2], this Court had gone no farther than to hold that the fact that a coupler broke while in use "at most presented a question for the jury"[3] whether the Safety Appliance Act had been violated, this court now for the first time holds that the statute

> "requires couplers which, after a secure coupling is effected, will remain coupled until set free by some purposeful act of control."

Not only is this conclusion reached by less than a majority of the members of this court, but to pose the issue for decision, it is necessary to change the theory of negligence, upon which the plaintiff pleaded and presented her case in the trial court and argued it in both reviewing courts, to a theory of non-negligence and to ignore altogether the theory upon which the defendant tried its case: that the decedent was not killed in the movement in which the couplers broke, so that any conceivable error in the instructions as to the effect of the coupler breaking was wholly harmless. But the decision of this Court goes beyond merely affording this widowed plaintiff a chance

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[1] **New Orleans etc. R. Co. v. Scarlet**, 249 U. S. 528; **Minneapolis etc. R. Co. v. Gotschall**, 244 U. S. 66; **St. Louis & San Francisco R. Co. v. Conarty**, 238 U. S. 243, 250; **Chicago B. & Q. R. Co. v. United States**, 220 U. S. 559, 571; **Louisville & Nashville R. Co. v. Layton**, 243 U. S. 617; **Johnson v. Southern Pacific Co.**, 196 U. S. 1, 18.

[2] **Western & Atlantic R. R. v. Gentle**, 58 Ga. App. 252, 198 S. E. 257; **Vigor v. Chesapeake & O. Ry. Co.** (C.C.A. 7), 101 F. 2d 865, 869. See 305 U. S. 654; 307 U. S. 635.

[3] **New Orleans etc. R. Co. v. Scarlet**, 249 U. S. 528; and see **Cochran v. Pittsburgh & L. E. R. Co.** (D.C. Ohio), 31 F. 2d 769, 771. Twenty years ago, Mr. Robert, the author of the authoritative text in this field, referred to this as "the true rule to be deduced from the cases." Robert, Federal Liabilities of Carriers (2nd Ed., 1929), § 620.

to try her case again upon another theory and, although no error is asserted in the submission of the defense of causation to the jury, to test that defense again. In extending the mandatory duty to provide couplers "which will couple automatically by impact and which can be uncoupled without the necessity of men going between the ends of the car" to include couplers which "will remain coupled until set free by some purposeful act of control" this court is guilty of legislating judicially, in violation of the doctrine of separation of powers contained in Article 1, section 1 of the Constitution, and the holding that the jury should be peremptorily so instructed not only denies this defendant the benefit of the jury's verdict in its favor on the issue of causation but also denies carriers in these Safety Appliance Act cases the right to trial by jury as guaranteed by the Seventh Amendment. We submit the implications of this decision go so far as to require a rehearing and a determination by a full court.

## I.

**The legislative history and the language of the statute, as construed for more than fifty years by the agencies charged with its enforcement demonstrate that the mandatory duty imposed by the statute relates solely to coupling and uncoupling functions.**

This Court construes the Safety Appliance Act to require "couplers which, after a secure coupling is effected, will remain coupled until set free by some purposeful act of control" because if construed "to require that cars be equipped with appliances which couple automatically by impact and which may be released without going between the ends of cars, but which need not remain coupled in the meantime" the Act "would guard against dangers incident to effecting an engagement or disengagement

while ignoring the even greater hazards which can result from the failure of a coupling to perform its main function, which is to stay coupled until released." However great the danger of a coupler defect "which sets cars running uncontrolled upon its tracks", we think it is clear that Congress left the issue of liability for such a defect to be determined by the principles of common law negligence; the legislative history of the coupler statute, the language chosen by Congress to express its intent and the construction which the Act has received since its enactment compel the conclusion that it was only the "dangers incident to effecting an engagement or disengagement" with which Congress was concerned in enactment of the statute. Over and over again the sponsors of the statute referred to the fact that experience had shown that the greatest single source of accidents to railroad employees was in coupling and uncoupling cars equipped with the old-fashioned link and pin couplings or with various types of automatic couplers which would not couple with other types and it was to guard against this class of accidents that Congress imposed upon carriers the absolute duty to provide uniform, automatic couplers which would not require the men to go between the ends of the cars.

The movement for the passage of legislation requiring automatic couplers began with the first national convention of State Railroad Commissioners in March, 1889, which unanimously adopted a resolution urging the Interstate Commerce Commission "to consider what can be done to prevent the loss of life and limb in coupling and uncoupling freight cars used in interstate commerce." President Harrison, in his annual message to Congress in 1889, called the attention of Congress to this resolution and urged Congress to pass legislation "to require

uniformity in the construction of cars." 21 Cong. Rec. 90. Again in his annual message in 1890 he asked for "uniformity in couplers." 22 Cong. Rec. 7. In his annual message in 1891 President Harrison referred specifically to the fact that he had twice urged legislation to avoid the "cruel and largely needless sacrifice" of 369 brakemen killed and 741 maimed while engaged in coupling cars out of a total of 2,451 killed and 22,390 injured during the year ending June 30, 1889. 23 Cong. Rec. Finally in his annual message of 1892, President Harrison said (24 Cong. Rec. 13):

> "In renewing the recommendation which I have made in three preceding annual messages that Congress should legislate for the protection of railroad employes against the dangers incident to the old and inadequate methods of braking and coupling which are still in use upon freight trains, I do so with the hope that this Congress may take action upon the subject. Statistics furnished by the Interstate Commerce Commisssion show that during the year ending June 30, 1891, there were forty-seven different styles of car couplers reported to be in use, and that during the same period there were 2,660 employes killed and 26,140 injured. Nearly 16 per cent of the deaths occurred in the coupling and uncoupling of cars, and over 36 per cent of the injuries had the same origin."

The Interstate Commerce Commission had been making similar recommendations in its annual reports to Congress. In its annual report for the year 1891, the Commission referred to the same resolution of the State Railroad Commissioners and to resolutions adopted the following years making the same recommendation. The Commission set forth fully the statistics of accidents to railroad employees, showing that in 1890, 15.05 per cent of the deaths and 35.02 of the injuries to railroad em-

ployees (the largest single class of accidents) "were caused by coupling and uncoupling cars", concluding that "fully 90 per cent of the lives lost and injuries incurred through coupling and uncoupling cars could have been avoided by the use of a uniform automatic coupler." Pointing out that in addition to the old link and pin coupling there were 37 different styles of automatic couplers in use, the Commission said:

> "The justice of the demands of the railroad employes for uniformity in safety appliances, more particularly in car couplers, can not be questioned and can better be appreciated when the difficulties, which the trainmen encounter daily and hourly in coupling and uncoupling cars, is understood. Under existing conditions when there are so many couplers in use it is impossible for men to know before going between the cars whether they have the ordinary links and pins to couple together, or two different types of the large variety of couplers now in use. No matter what coupler is used, no matter how perfect its mechanism and working, if it does not couple as well and as freely with every other coupler now in use as it will with another coupler of its own make, it is to that extent, a death trap. What the railroad employes of the country demand is uniformity. They want all couplers alike, and they are men whose lives and persons are at stake, for with about a million freight cars in use the change to any particular coupler must cause a great injury to their number and loss of life in bringing it about. This great element of uncertainty, coupled with the danger to life and limb in consequence of such uncertainty should be remedied so that trainmen when coupling and uncoupling cars may know that the couplers will be of the same type." 5th Annual R. Inter. Com. Comm., 1891.

In its report the following year the Commission called attention to legislation which had been proposed "to re-

quire the railroads to select or decide upon some standard coupler, uniform height of draw bar and other methods of insuring uniform safety appliances" and said (6th Annual R. Inter. Com. Comm. 1892, 69, 70):

> "It should not be lost sight of that the end to be attained is uniformity in railway safety appliances.
>
> "Statistics show that the number of deaths and injuries among railway employes, occurring for the most part in coupling freight cars and falling from trains, is yearly increasing in this country, not only in the actual number of casualties, but in proportion to the number of employes engaged in the service. That these casualties are largely due to lack of uniformity in couplers and other appliances there can be no doubt."

The debates in Congress show very clearly that the purpose of Congress was to require uniform automatic couplers in order to guard against the unnecessary hazards incident to coupling and uncoupling cars because of non-uniform and non-automatic coupling devices. Senator Cullom, who was in charge of the bill in the Senate said:

> "* * * we simply desire a uniform coupling that will be adopted by the common carriers of the whole country so that the laboring men engaged in the operation of the cars and trains shall be protected in their lives and limbs as far as possible when they undertake to couple cars together. That is all we desire. * * *" (24 Cong. 1249.)

Later referring to the companion provision of the statute providing for a uniform height of draw bars, Senator Cullom said:

> "Perhaps the cause of the greatest loss of life to employees operating railroad cars is the difference in the height of cars which they have to couple. The employees go into the yard in the dark and are required to go between the cars to couple them. A man

so situated cannot tell what kind of car is coming to him to be coupled with the car by which he is standing.

"If it happens to be a car that will couple to the one to which he desires to attach it he is not hurt, but if it happens to be a car the draw bar of which is 2 or 3 inches below or 2 or 3 inches above that of the other car when the two come together the man is crushed.

"That is one of the important reasons why something must be done if we have any regard for human life in carrying on Interstate Commerce." 24 Cong. Rec. 1250.

On the following day continuing the argument, Senator Cullom said:

"Then as to the second section of the bill, that section has reference only to what are usually called automatic couplings. *It was the intention and purpose of the committee,* and I think it is carried out in substitute, *to simply require a uniform coupler,* the testimony showing that such a coupler must be put in use by direction of the National Government in order to protect the lives of the people operating the trains, taking care of the cars, coupling them etc." 24 Cong. Rec. 1273. (Emphasis supplied)

In support of his argument Senator Cullom referred to the statistics for the years 1888 to 1891, showing that more than 15 per cent of the railroad employees killed during those years and from 33 to 37 per cent of those injured were killed or injured in accidents which occurred while coupling or uncoupling cars. The statistics also showed that the next largest class of accidents were to trainmen who fell from the trains while setting hand brakes. 24 Cong. Rec. 1274. Later he continued:

"*The purpose of the committe in this bill is simply to provide for a uniform coupler* and for an air

brake about which there shall be no particular controversy. When we get the cars of this country equipped with uniform couplers and with air brakes *so that men will not be required to get between the cars,* so that men who are on top of the cars today will be taken off and thereby relieved of the danger from such positions, there will be no occasion for further legislation on the subject, in my judgment." 24 Cong. Rec. 1287. (Emphasis supplied)

In the debates on February 10, 1893 other Senators referred to the old link and pin couplings and to the practical necessity of men getting in between the ends of the cars in order to couple and uncouple them and various amendments were offered which reflected views of the several Senators. 24 Cong. Rec. 1417-1426.

At no time in the debates in Congress was any other purpose stated than that of securing uniform and automatic couplers to eliminate the hazards incident to coupling and uncoupling cars and always the emphasis was upon couplers which were uniform and automatic so that switchmen were not obliged to go between the ends of the cars. Never was there any reference to any necessity to impose a mandatory duty to provide "safe" or "secure" couplers. The language which Congress selected—"couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars"—was obviously selected because it precisely fitted the situation which Congress had in mind. In Section 4 of the same bill Congress imposed the requirement of "secure grab irons or hand holds." Certainly if Congress had intended to require couplers which would "remain coupled until set free by some purposeful act of control" the language of this much discussed statute would have required "secure couplers" or some such language as "couplers coupling

automatically by impact, which will remain coupled, and which can be uncoupled without the necessity of men going between the ends of the cars." But there is no suggestion whatever in the legislative history of this bill which affords any support whatever to the intention which this Court now for the first time imputes to Congress.

The construction of the statute by the Interstate Commerce Commission which was charged by law with the details of its enforcement and by the courts, further confirms the fact that it was the intention of the Congress in passing this statute to protect the lives and safety of the men engaged in coupling and uncoupling operations by requiring uniform and automatic couplers and not to provide generally for "secure" couplers or "safe" couplers or "efficient" couplers as Congress had done in other provisions of the Safety Appliance Act with respect to other appliances.

Following the enactment of the statute both the Interstate Commerce Commisson and this Court showed very clearly their understanding that the purpose of the statute only was to guard against dangers incident to coupling and uncoupling cars by requiring uniform and automatic couplers. The Interstate Commerce Commission in its 7th annual report said: (7th Annual R. Inter. Com. Comm. 1893, 76)

> "For a considerable portion of the time necessary to effect the changes in equipment required by the law, a reduction of the number of casualties to railway employes, especially those which result from coupling cars, can hardly be hoped for. Experience has shown that dangers incurred in coupling cars are likely to continue while new devices are from time to time being introduced, owing to lack of uniformity.

"It will be observed that the law does not in any way restrict the use of automatic couplers to any particular type or types, and therefore it can hardly be open to the objection urged against it that it would especially benefit a particular patentee.

"In the matter of couplers *the aim of the law is that the men shall not be required to go between cars in order to couple or uncouple them,* and therefore a road must not only equip its freight cars with couplers that are interchangeable, but can not use upon its line the cars of other roads which do not automatically couple with their own." (Emphasis supplied)

Later, commenting on the first of the court decisions in cases arising under the statute, particularly *Johnson* v. *Southern Pacific Co.* (C.C.A. 8) 117 Fed. 462, the Commission said (16th Annual R. Inter. Com. Comm. 1902, 61):

"* * * If this ruling should be upheld on appeal it would have the effect of nullifying a *main object of the statute,* which *is to secure such uniformity in applied automatic coupling devices as to permit all cars in a train to be coupled and uncoupled without requiring men to go between the cars* The act in terms prohibits any carrier from hauling or permitting to be 'hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.' Carriers are left free by the statute to use any kind of automatic coupler they see fit, *the sole and governing restriction being that,* whatever kinds of coupler may be used, *no cars shall be hauled or used on the line which do not couple automatically by impact, or can not be uncoupled without men going between the cars;* and this applies to the hauling of all cars, whether owned by the carrier operating the road or by other carriers." (Emphasis supplied)

The *Johnson* case came before this Court at the October, 1904 term. *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1. This Court reviewed at length the legislative history which we have set forth above and concluded: (196 U. S. at 19)

> "*The risk in coupling and uncoupling was the evil sought to be remedied,* and that risk was to be obviated by the use of couplers actually coupling automatically. True, no particular design was required, but whatever the devices used they were to be effectively interchangeable. Congress was not paltering in a double sense. And its intention is found 'in the language actually used, interpreted according to its fair and obvious meaning.' *United States* v. *Harris,* 177 U. S. 305, 309.
>
> "That this was the scope of the statute is confirmed by the circumstances surrounding its enactment, as exhibited in public documents to which we are at liberty to refer. *Binns* v. *United States,* 194 U. S. 486, 495; *Holy Trinity Church* v. *United States,* 143 U. S. 457, 463." (Emphasis supplied)

We do not contend that liability under the statute is limited to men injured while coupling or uncoupling cars; the contrary has long since been settled. We do contend, however, that the language which Congress used, considered in the light of the purpose which Congress was seeking to obtain demonstrates that the only mandatory duty which Congress imposed on carriers was to provide cars with uniform and automatic couplers in order to reduce the heavy toll of accidents in coupling and uncoupling operations. Under the guise of "construing" the statute this Court is not justified some other mandatory duty in order to serve some other purpose.

*Minneapolis and St. Louis R. Co.* v. *Gotschall,* 224 U. S. 66, is not "anticipatory" of the construction now placed by this Court for the first time upon the fifty-seven

year old coupler statute. While it is true that the court in that case used "the vocabulary of negligence" it would have been a very simple matter indeed for the court to have said that the breaking of the coupler was *conclusive* evidence of negligence rather than that "negligence might be *inferred* from the mere opening of the couplers." That this Court in the *Gotschall* case did not mean to hold what the Court now says it did is made clear by its decision two years later in *New Orleans etc. R. Co.* v. *Scarlet*, 249 U. S. 528, relied upon by the respondent in its brief and argument here, but not referred to in the Court's opinion. In the *Scarlet* case the precise question was before this Court: whether "the mere breaking of a king pin and coupling chains shows conclusively that they were defective" and thereby conclusively established a violation of the Safety Appliance Act, the particular provision there relied upon being the mandatory duty imposed by the Boiler Inspection Act, that the parts and appurtenances of a locomotive be "in proper condition and safe to operate in the service to which same are put • • • without unnecessary peril to life or limb." 45 U.S.C.A. §23. This Court held that the fact that the coupler broke "did not establish as a matter of law that the king pin or the chains were defective; "at most, it presented a question for the jury," citing the *Gotschall* case. The two opinions read together show clearly that this Court did not "anticipate" any construction of the explicit language of the coupler statute extending the mandatory and absolute duty imposed by the statute beyond coupling and uncoupling without men exposing themselves to unnecessary risk of injury by going between the ends of the cars.

However great the dangers incident to the breaking of a coupler, we submit that the legislative history of the statute, the announced purpose of the sponsors of

the legislation and the language which Congress "actually used, interpreted according to its fair and obvious meaning" compel the conclusion that the only purpose intended to be accomplished by the Act was to guard against the dangers incident to coupling and uncoupling cars equipped with non-uniform and non-automatic couplers. For more than fifty years that has been understood to be the purpose of the statute and the sole measure of the absolute liability imposed by its terms. For more than fifty years Congress has seen fit not to extend the scope of the statute although in companion statutes it has used terms such as "secure," "efficient," "in proper condition and safe to operate," etc. For this Court to broaden the statute's explicit language by judicial construction merely because this Court feels that some additional purpose should be served or some other danger should be guarded against is to legislate judicially. We submit that every principle of statutory construction forbids the interpretation which this Court has placed on the coupler statute. As four members of this Court said in *Urie* v. *Thompson* 337 U. S. 163:

> "• • • due regard for the limits of judicial interpretation precludes such free-handed application of a statute to situations outside its language and its purpose."

## II.

**To give a peremptory instruction in this case is to deny the right to trial by jury.**

For the past decade and more, this Court has insisted that is the function of the jury to pass upon disputed questions of negligence and liability in these Federal Employers' Liability Act cases. *Wilkerson* v. *McCarthy*, 366 U. S. 53; *Lavendar* v. *Kurn*, 327 U. S. 645; *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29. The same prin-

ciples have been applied in actions under the Safety Appliance Act and the related provisions of the Boiler Inspection Act. (45 U.S.C.A. §§ 1, *et seq.*) *Myers* v. *Reading Co.*, 331 U. S 477; *Penn v. Chicago & N. W. Ry. Co.*, 335 U. S. 894; *Lilly* v. *Grand Trunk W. R. Co.*, 317 U. S. 481, *Urie* v. *Thompson*, 337 U. S. 163. In the *Myers* case, this Court held it was for the jury to determine from the failure of the brake to function on one occasion whether the brake was "efficient." The same rule was applied in the *Penn* case, where the uncoupling lever did not operate on the first application. In the *Lilly* and *Urie* cases the question for the jury was whether the ice on the tender, or the condition of the sanders, violated the mandatory duty to keep the locomotive "in proper condition and safe to operate."

In the present opinion this Court goes beyond these cases and holds that the malfunction of the coupler, although not within either of the functions specifically required by the statute, nonetheless entitles the plaintiff to a peremptory instruction that to equip a car with a coupler which broke in the switching operation was a violation of the Act." But if it is for the jury to determine whether an icy footing on the deck of a tender or a "bad order" sander was "in proper condition and safe to operate," or whether a brake which does not hold is "efficient" or whether a coupling lever which does not operate upon the first application is one which permits the cars to become "uncoupled without going between the ends of the cars," certainly it was for this jury to determine whethed this coupler which broke complied with the statute.

In the cases cited by this Court as holding that "failure of couplers to remain coupled until released constitutes or evidences a violation of the Act," as we pointed out

at pages 21 to 23 of respondent's brief, the question in dispute, whether the breaking of the coupler was a violation of the Act or was the proximate cause of the accident *was submitted to the jury in each instance.* Not one of those cases approves a peremptory instruction for the plaintiff. This Court has repeatedly condemned the giving of peremptory instructions in these cases and emphasized "the importance of preserving for litigants in F.E.L.A. cases their right to a jury trial." See *Wilkerson* v. *McCarthy, supra.*

To take from the jury the issue whether this coupler measured up to the standard prescribed by the statute is to deny this defendant, a litigant in an F.E.L.A. case, its right to a trial by jury just as much as a peremptory instruction for the defendant deprives a plaintiff of a jury trial. The duties imposed by the Safety Appliance Acts are absolute; the command of the statute is in each instance mandatory; but whether the appliance or the equipment complies with the mandate of the statute is properly a question for the jury. To deprive carriers of their right to have the issue determined by a jury is as much the deprivation of a constitutional right as is a directed verdict for the defendant in a disputed question of statutory violation or common law negligence.

Finally, we submit this Court should not deprive this defendant of its jury verdict merely because this Court feels the plaintiff should have tried her case upon another theory. Plaintiff tried her case as a negligence action, but she cannot complain of that. Only by stripping plaintiff's claim of all aspects of negligence does this Court bring into focus the issue upon which the verdict of the jury is set aside. Not only did the plaintiff fail to submit either by way of requested instructions to the trial court or by way of argument to the jury the theory of non-negligence upon which this Court predicates its

decision, but the defendant did not defend on the converse of this Court's theory. This case was tried upon the sole issue whether the decedent was killed in the movement upon which the coupler broke, or in the final movement out of the yard. Successively each court has held unanimously that this issue was properly submitted to the jury. The verdict of the jury could have been based only on the issue argued before it. Certainly the verdict should not be set aside for the reason that if the plaintiff had pleaded and presented her case upon an entirely different theory she would have been entitled to different instructions upon the effect of the coupler breaking than she requested at the trial, when the jury obviously found that the breaking of the coupler had nothing to do with the accident.

## PRAYER.

The respondent respectfully prays that in order to correct this Court's misapprehension of the purpose and scope of this statute, and to insure, rather than to deny, the right to trial by jury of the issues in this case, a rehearing should be granted and the judgments below affirmed.

Respectfully submitted,

HARLAN L. HACKBERT,
*Attorney for Respondent.*

### Certificate of Counsel.

The undersigned counsel for respondent hereby certifies that the foregoing petition is presented in good faith and not for delay.

Harlan L. Hackbert

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949.

## No. 56

SARAH O'DONNELL, Administratrix of the Estate of WILLIAM O'DONNELL, Deceased,

Petitioner,

vs.

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,

Respondent.

## Answer to Petition for Rehearing.

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## ANSWER TO PETITION FOR REHEARING

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### I.

**The interpretation placed on the Safety Appliance Act in this case is consistent with the judicial construction of the Act, which has remained unchanged for more than 40 years, and with the intent of Congress as explained in the preamble to the Act.**

Defendant's assertion that this Court found it necessary to change the "theory of negligence upon which the

plaintiff pleaded" and tried her case in the trial court and "argued it in both reviewing courts to a theory of non negligence and to ignore altogether the theory upon which the defendant tried its case" is simply not true, as shown by: (1) plaintiff's requested instructions (R. 261, 262); (2) by the argument made to the jury by counsel for the plaintiff (R. 146); (3) by the argument made by counsel for the defendant (R. 156, 158, 159); (4) by defendant's pleading (R. 14) and its motion for a directed verdict which was based on the sole ground that the breaking of a coupler did not come within the purview of the Act (R. 144); (5) by plaintiff's written motion for a new trial (R. 224-230); and (6) by the briefs filed in the Court of Appeals and in this Court.

The plaintiff pleaded and tried her case on the theory that the breaking apart of the coupler in question established a violation of the Safety Appliance Act as a matter of law and was in and of itself negligence *per se* rendering the defendant absolutely liable if such breaking caused or proximately contributed to cause the death of decedent.

While the plaintiff's complaint (R. 13), it is true, alleges that the defendant negligently failed to equip and maintain on the car in question a safe and efficient coupler that would remain coupled to the car to which it was attached, the characterization of defendant's failure to comply with the Act as negligence was wholly unnecessary and should have been so regarded and treated as surplusage by the trial court. Under the undisputed evidence in this case, in the light of this Court's construction of the Act, imposing on the railroads a positive duty to furnish safe couplers, the refusal to give plaintiff's requested instructions 4, 5, 6 and 7 (R. 261, 262),

which set forth all the facts essential to her right to recover, independently of any question of negligence on the part of either the plaintiff or defendant, and directed the jury to find for the plaintiff if the breaking of the coupler caused or proximately contributed to cause the death of decedent, constituted reversible error. The instructions given by the court at the request of the defendant that the happening of the accident created no presumption of negligence on the part of the defendant (R. 187); that that was an affirmative fact for the plaintiff to prove; that it was not sufficient for the plaintiff to prove "that defendant may possibly have been guilty of negligence, the evidence must show that it was guilty of negligence" also constituted reversible error even on defendant's theory—which was advanced for the first time on appeal—that the jury had the right to infer from the breaking of the coupler that the defendant was negligent, or that the jury "could infer that the railroad had violated the prohibition of the Acts * * *" as stated in the dissenting opinion herein.

In particular, the plaintiff tendered instructions on the non negligence theory, which were refused by the trial court, and the defendant tried its case on the theory that it could not be held liable under the Safety Appliance Act unless it was guilty of negligence.

The first 12 pages of Defendant's Petition are devoted to a historical review and argument intended to show that the sole Congressional purpose of Section 2 of the Safety Appliance Act was to prevent the necessity of men going between the cars in coupling operations. Having labored this point in some detail, the Defendant finally concedes, p. 12:

> "We do not contend that liability under the statute is limited to men injured while coupling or uncoupling cars; the contrary has long since been settled."

If the Act is not limited to coupling operations, why did Defendant find it necessary to devote a large part of its Petition to proving that it should be so limited?

The moral which defendant seeks to draw from its review seems to be that "the only mandatory duty • • • imposed • • • was to provide cars with uniform and automatic couplers in order to reduce the heavy toll of accidents in coupling and uncoupling operations." If this be so, then the courts were wrong in their repeated decisions which failed to limit the liability to men engaged in coupling operations. Or perhaps defendant envisages a statute which can be split up into parts, one which is mandatory, the other not. Defendant's argument is not persuasive.

The Safety Appliance Act itself belies defendant's contention that its sole purpose was to prevent men from going between the cars. The Act as originally passed, which still stands unchanged (March 2, 1893, Chapter 196, 27 Stat. 531), was preceded by the following preamble:

> "An act to promote the safety of employees and travelers upon railroads by compelling carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving wheel brakes, and for other purposes."

If keeping employees from going between the cars were the only consideration, why did Congress refer specifically to promoting the safety of *travelers?* Travelers have nothing to do with going between the ends of cars to effect couplings, or for any other purpose. It seems fundamental to us that when Congress required automatic couplers to be provided for the purpose of promoting the safety of travelers, it is no unwarranted ex-

tension of the Congressional intent to hold that the couplers must not break while in use.

How could the Safety Appliance Act inure to the benefit of the traveling public if the railroads might, with impunity, use and maintain defective couplers, provided they could be coupled or uncoupled automatically by impact? Should the railroads be heard to say, as the defendant insists in this case and as the Court of Appeals found, that the Safety Appliance Act did not require the defendant to furnish couplers that would not break? We submit that to ascribe to Congress, in the enactment of the Safety Appliance Acts, an intent to require couplers to couple and uncouple automatically without regard to their condition or safety in other respects, would defeat one of the fundamental purposes sought to be accomplished.

The construction of the Safety Appliance Act which the Court has announced in this case, while removing an uncertainty of long standing, is not revolutionary, nor is it out of harmony with previous decisions of this Court. The absolute duty (as to men engaged in coupling operations) to maintain couplers in the condition prescribed by the statute is conceded by the defendant.

This Court, in *St. Louis & I. M. Ry.* v. *Taylor*, 210 U.S. 281, *Chicago B. & Q. R. Co.* v. *United States*, 220 U. S. 559, and *Delk* v. *St. Louis & San Fran. R. Co.*, 220 U.S. 580, laid down the fundamental principles of construction of the Act. The *Taylor* case was decided in 1908. In the 41 years which have elapsed since that decision, Congress has not seen fit to change the Act in any way, and will be presumed to have acquiesced in the construction which was adopted by this Court.

More recently this Court held that the protection afforded by the Act extended to persons only remotely affected, such, for instance, as travelers on the highway (*Fairport R. Co.* v. *Meredith,* 292 U.S. 589). Moreover, while it may be true that the most urgent reason for enacting the Safety Appliance Act was the appalling number of accidents occurring when men went between the cars, yet when Congress has plainly indicated that it had other considerations also in mind, and this Court has announced a rule of liberal statutory construction, it is untimely to seek to turn the clock back and resort to a narrow and strict construction of the Act. The construction of the Safety Appliance Act is no longer an open question.

In the case of *Louisville & N. R.R. Co.* v. *Layton,* 243 U. S. 617, wherein it was contended by the defendant that the Act in question was intended only for the benefit of employees injured when actually engaged in coupling or uncoupling cars, this Court said, pp. 620, 621:

> "While it is undoubtedly true that the immediate occasion for passing the laws requiring automatic couplers was the great number of deaths and injuries caused to employees who were obliged to go between cars to couple and uncouple them, yet these laws as written are by no means confined in their terms to the protection of employees only when so engaged. The language of the acts, and the authorities we have cited make it entirely clear that the liability in damages to employees for failure to comply with the law spring from its being made unlawful to use cars not equipped as required,—not from the position the employee may be in or the work which he may be doing at the moment when he is injured."

In the case of *Swinson* v. *Chicago St. M. & O. R. Co.,* 294 U. S. 529, this Court also stated:

"• • • an employee 'can recover if the failure to comply with the requirements of the Act is a proximate cause of the accident, resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection,' "

Defendant repeats the groundless assertion that it tried its case solely on the theory that the decedent was not killed on the movement when the coupler broke and that therefore any conceivable error in the instructions "was wholly harmless." It urges that the majority opinion in extending the mandatory duty of the defendant to provide couplers which will remain coupled " 'until set free by some purposeful act of control' • • • denies this defendant the benefit of the jury's verdict in its favor on the issue of causation."

This assertion is contradicted by the record. Defendant argued to the jury that the railroad company was not negligent "as concerns that coupler" (R. 158) and that there was no evidence that the coupler failed to function as the statute required (R. 159). Defendant procured instructions requiring the jury to find it guilty of negligence before recovery could be had. While it is true the defendant also argued that the decedent was killed in the last movement instead of the first, it cannot be successfully maintained that this was its sole theory, or that the jury ever considered or passed upon that issue.

In the concluding paragraph of its Petition, defendant asserts that the plaintiff failed to submit any requests that the jury be instructed on the "theory of non-negligence upon which this Court predicates its decision." Plaintiff's requested instruction No. 5, R. 261, 262, told

the jury that if the broken coupler caused decedent's injuries, the defendant should be found guilty, and negligence or contributory negligence were immaterial. Requested instructions Nos. 6, 7 and 8, R. 262, were also predicated on the "non-negligence" theory. Thus it appears that plaintiff attempted to have the jury instructed in accordance with the views expressed by this Court in its opinion.

Defendant in the same paragraph makes the further statement that the case "was tried upon the sole issue whether the decedent was killed in the movement upon which the coupler broke, or in the final movement out of the yard." We pointed out in our Petition, pp. 30, 31, that the defendant argued to the jury, over our objection, but with the court's approval, as follows (R. 158):

> "The law does not say anything whatever about couplers which break, and I think after you hear Judge Campbell's instructions as to what the law is you will conclude that the requirements of the law, so far as a coupler breaking is concerned, is that the railroad company must use ordinary and reasonable care. There is not a word of evidence here that there was anything about the condition of this coupler which could have caused anyone to believe that it was at all likely that it would break. So I say if that is the law you must necessarily find that there has been no proof here that the railroad company was negligent as concerns that coupler."

This contention was also emphasized by the trial court in its instructions. It follows that defendant's assertion

that "The jury obviously found that the breaking of the coupler had nothing to do with the accident," is not supported by the record. As we have heretofore shown, the jury under the court's instructions was not required to consider or make any finding on this issue.

It is alleged in one paragraph of the plaintiff's complaint (R. 261) that while decedent was at work between the cars on track 5 the defendant "negligently propelled and impacted two or more of the said cut of cars upon and against the said standing cars where plaintiff's decedent was at work as aforesaid." The Federal Employers' Liability Act rendered the defendant liable for any negligence on the part of any of its officers, agents or employees or by reason of *any defect or insufficiency due to its negligence in its cars, engines, appliances, etc.*

Evidence was introduced by the plaintiff tending to prove that the defendant was guilty of negligence as charged in said paragraph. The trial court's charge to the jury that under this paragraph of her complaint the plaintiff was required to prove negligence on the part of the defendant before she could recover was entirely proper, but it was not limited to the charge as set forth in that paragraph but was made equally applicable to the one remaining paragraph which plaintiff pleaded and relied upon (as shown by her requested instruction—R. 261, 262) which charged a violation of the Safety Appliance Act. The jury might well have found, independently of the Safety Appliance Act, that the defendant was guilty of negligence under the Federal Employers' Liability Act and the plaintiff was entitled to have the jury instructed to that effect. In instructing the jury that the plaintiff was required to prove negligence on the part of defendant under both paragraphs of her com-

plaint was deprived of all benefits accruing to her under the provisions of the Safety Appliance Act.

## II.

**A party is entitled to a jury trial only when there is a dispute as to the facts or when different inferences can be reasonably drawn therefrom. There was no dispute as to the breaking of the coupler, hence proximate cause was the only question which properly should have been submitted to the jury.**

In the cases referred to by the defendant in support of its contention that the ruling of this Court deprives it of its right to a jury trial, factual disputes were involved. Where it is claimed that a brake did not function at the time of the accident, although it was in working order both before and afterwards, a question of fact necessarily arises. Where the claim is made that ice on the tender renders the locomotive unsafe to operate, opinions of reasonable men might very well differ. In our case, however, no disputed question of fact regarding the couplers was involved. It is not claimed that they did not break; it must be conceded that they were not in condition to function. No factual question as to the violation of the Act arose. Of course, if there is no fact question, it is not necessary nor is it proper to submit it to the jury. Nor is the defendant being deprived of its right to a jury trial under such circumstances. In the instant case, the defendant would still be entitled to the verdict of the jury on the question of proximate cause, and on the question of damages. These are the only factual questions open.

The finding by the Court of Appeals that the Act did not require the defendant to "furnish couplers that would

not break" but that the jury may, if they think it reasonable, "infer that the coupler was defective and was furnished and used in violation of the Act" was rejected by this Court. That the jury had the right to infer from the breaking and separation of the cars that the Act had been violated is, we diffidently submit, an anomalous and inconsistent conclusion. That the jury "was adequately instructed to that effect" as stated in the dissenting opinion herein (in the light of the repeated admonition in the judge's charge to the jury that in order to entitle the plaintiff to recover it was incumbent upon her to prove negligence on the part of the defendant) we also submit is not justified and is without support in the record.

Respectfully submitted,

JOSEPH D. RYAN,
Attorney for Plaintiff.